



# Office of Command Counsel Newsletter

June 1997, Volume 97-3

## On the way to the CLE

As we go to press the 1997 Continuing Legal Education Program (CLE) is right around the corner. Thanks to the support from General Wilson and your MSC Commanders, expected attendance is excellent, we have designed a comprehensive program for you and we expect the most successful program ever. A full report on the CLE will be presented in Newsletter 97-4.

A highlight of the program will be a presentation by General Wilson updating us on developments within AMC and Department of Army. The CG will also preside at our annual Command Counsel Award Ceremony at which time we will recognize many of your colleagues who made significant contributions during the last year.

Additionally, Major Gen-

eral (Ret) William K. Suter, Clerk of the U.S. Supreme Court will take us on a behind the scenes tour of the Court to include a presentation in the Courtroom.

Attendees will be able to enjoy a "Washington After Dark" tour that will allow us to visit a dozen landmarks including the new Franklin Delano Roosevelt Memorial.

## And thanks for...

We appreciate the many favorable responses received concerning the new Newsletter format and contents. You will see many of your specific recommendations incorporated in this and future editions.

For those of you who experienced difficulty downloading the Newsletter we offer the following tips:

1. You must have the free Adobe Acrobat Reader 3.0 installed on your system.

2. The Acrobat Reader is available at <http://www.adobe.com/prodindex/acrobat/readstep.html>

3. The Newsletter is also available on the LAAWS Bulletin Board.

4. If you have any questions or problems accessing the newsletter, please call Steve Klatsky (703-617-2304) or Joe Edgell (703-617-2306). You may also reach them by e-mail at [sklatsky@hqamc.army.mil](mailto:sklatsky@hqamc.army.mil) or [jedgell@hqamc.army.mil](mailto:jedgell@hqamc.army.mil).

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# Letter to the Editor:

## "Cash for Frequent Flyers?"

The SSCOM Legal Office has taken the time to prepare a Letter to the Editor, seeking to reopen a dialogue on the issue of the availability of Army Appropriations to pay cash awards to employees who enroll in commercial Frequent Flyer programs. While not challenging the DA OGC

legal opinion, SSCOM cites the GAO opinion in Railroad Retirement Board, B-27640, May 9, 1997, as encouraging creative agency efforts to reward employees for saving the government's travel dollars. Thanks to **John Stone** and staff (Encl 17). What do you think?

## List of Enclosures

1. Interagency Working Group on Federal Court Disappointed Offeror Litigation.
2. Estimates of Requirements Contracts.
3. Capturing Discretion to Thwart Possible Court Challenge.
4. New Developments in Task and Delivery Order Contracting.
5. Federal Court Protective Orders: When Are Counsel's Contacts Too Many?
6. Legal Opinion Regarding "Offer/Proposal" Versus "Other Information".
7. Interpretation of DoD Handbook 5000.60 H "Assessing Defense Industrial Capabilities".
8. Official Time for Union Representation.
9. Senior Civilian Affirmative Outreach and Recruitment Policy.
10. Successorship or Accretion — Labor Relations Bulletin No. 401.
11. Environmental Law Bulletin April 1997.
12. Environmental Law Bulletin May 1997.
13. Lead-Based Paint Concerns on BRAC Properties.
14. Army Relationships with Non-Federal Entities.
15. Interim Policy on Acceptance of Travel Expenses in Connection with Certain Unofficial Teaching, Speaking, and Writing Activities.
16. Requests to DA Personnel for Interviews, Notices of Depositions, Subpoenas, and Other Requests or Orders Related to Judicial or Quasi-Judicial Proceedings.
17. Letter to the Editor — Fly Free.

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Back Issues are available by contacting the Editor at (703) 617-2304.

Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to [sklatsky@hqamc.army.mil](mailto:sklatsky@hqamc.army.mil)

Check out the Newsletter on the Web at [http://amc.citi.net/amc/command\\_counsel/](http://amc.citi.net/amc/command_counsel/)

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

# Acquisition Law Focus

## Do You Need Export Authorization for Foreign Military Sales Cases?

A frequently asked question by defense contractors: "Do I need an export authorization when I provide a defense service to a foreign government under a Foreign Military Sales (FMS) case?" Until recently, the general response to the question was NO. Several months ago, the State Department Office of Defense Trade Controls issued notice that an export authorization in the form of a Technical Assistance Agreement is required to provide a defense service in support of an FMS contract.

In the past, defense contractors had used the exemption under 22 Code of Federal Regulations (CFR) Section 126.6(c). That particular ex-

emption is applicable only when the following three conditions are met: (1) there is a valid DoD Letter of Offer and Acceptance (LOA); (2) a State Department form DSP-94 has been properly executed; and (3) the export is made by the relevant foreign diplomatic mission or its authorized registered freight forwarder. The State Department has now determined that in the case of a defense service the contractors cannot meet condition (2) because a DSP-94 cannot be prepared for services.

General guidance on the preparation of a Technical Assistance Agreement can be found in 22 CFR Part 124.

POC is HQ AMC's **Larry D. Anderson**, DSN 767-8040.

## Assessing Defense Industrial Capabilities

TACOM-ARDEC's **Denise Scott**, DSN 880-6585, provides a paper on the DoD Directive 5500.60 "Defense Industrial Capabilities" and accompanying Handbook. The documents were issued last year as a framework to evaluate the need for DoD action to preserve defense industrial

capabilities. Ms. Scott's analysis seeks to clarify confusion as to when and how to apply the Handbook.

The role and responsibility of the Defense Acquisition Executive (DAE), the PEO structure, the impact of CICA and the work of an Integrated Process Team on the subject are all covered (Encl 7).

## When Are Counsel's Contacts Too Many?

CBDCOM Counsel **Lisa Simon**, DSN 584-1298, has written an outstanding paper on a recent ruling by the US Court of Federal Claims in Hydro Engineering v. United States, No. 95-564C, 1997 U.S. Claims LEXIS 51 (Fed. Cl. March 10, 1997), which excluded a private attorney's access to proprietary and source selection sensitive information under a bid protest protective order. The Court's determination applied similar standards to those currently used by the GAO in protective order situations:

- (1) the attorney's intimate contacts with a potential competitor;
- (2) the attorney's pre-proposal representation of a potential competitor; and
- (3) the attorney's unwillingness to sever such contacts in future related procurements.

Ms. Simon recommends that prior to release of sensitive information pursuant to a Court of Federal Claims protective order, government counsel should take reasonable steps to determine the nature and extent of an unfamiliar attorney's representation (Encl 5 ).

# Acquisition Law Focus

## Disappointed Offeror Litigation Working Group

HQ AMC Protest Counsel **Craig Hodge**, DSN 767-8940, has been AMC's contact to this group, which has prepared a "White Paper: Recommendations for the Bid Protest Group of the US Court of Federal Claims Advisory Council."

The interagency group will continue to gather and review information on disappointed offeror litigation practice and procedure, submitting a report to the Court Advisory Council.

The White Paper high-

### Capturing Discretion to Thwart Possible Court Challenge.

HQ AMC Protest Counsel **Vera Meza**, DSN 767-8177, provides a very interesting paper suggesting that we should not conclude that the exercise of discretion by government contracting officials will always be viewed as reasonable. Ms. Meza suggests that contract file documents may not adequately support the process behind the exercise of discretion — leading GAO or the Courts to conclude that the government acted in an arbitrary or capricious manner (Encl 3).

lights the need for Court guidance, suggesting that the Court should process disappointed offeror litigation in a manner similar to the traditional administrative protest forum — the General Accounting Office, and recommending the adoption by the Court of a clearly articulated legal standard and scope of review.

The White Paper's Table of Contents is provided to you. For further information, please contact **Craig Hodge** (Encl 1).

### Task and Delivery Order Contracting Developments

CECOM's **Micheline Darcy LaForgia**, DSN 992-5056, who serves as that command's Special Advocate for Competition, has written a memorandum describing the process of having a Task and Delivery Order Ombudsman address contractor complaints, rather than resorting to expensive, time-consuming litigation. The Ombudsman approach is outlined in the Federal Acquisition Streamlining act (FASA) of 1994, PL 103-355, 10 USC 2304c(e) and 41 USC 253j(e) (Encl 4).

## Underfunded Pensions

The IOC is currently involved in an issue which concerns the allowability of pension costs.

In this case the GOCO contractor made a business decision not to make contributions (or to contribute an amount less than the CAS limit) during certain prior years. The pension plan is now underfunded, and the contractor is claiming the Government must make up the difference.

The Government's position is that since the contractor did not make the necessary contributions to the pension fund during the years at issue, some of the costs are now unallowable. The contractor claims it is being unfairly penalized because the Government received the benefit of lower costs during the years when lower contributions were made.

The issue is a critical one — stay tuned. The POC is **Bernadine F. McGuire**, IOC, DSN 793-8436.

### Names are changing

Have you noticed a trend within the AMC legal community to change the name Acquisition Law Branch or Division to Business Law or Business Operations Branch or Division? This reflects the increased involvement of the legal office in the design of the business practices, tactics and strategies of AMC.

## DOD Undersecretary Issues Guidance for Non-Core Work Competition

Under Secretary of Defense for Acquisition and Technology **Paul G. Kaminski** issued internal guidance on May 2 providing for public-private competitions for depot-level maintenance activities not determined to be necessary to sustain core capabilities. The guidance also outlined procedures for determining workloads, selecting sources, and cost estimating and accounting.

The guidance, effective immediately states:

Our goal is to obtain the best value for our depot maintenance dollars while still satisfying core depot maintenance capability requirements. Subjecting depot maintenance workloads that are not required to sustain core capabilities to the forces of competition can lower costs and improve readiness, irrespective of whether the outcome is to outsource or not. In accordance with 10 USC 2470, DOD depot-level maintenance activities shall be eligible to participate in public-

private competitions (PPCs) for depot-level maintenance and repair workload.

The new public-private competition policy is consistent with recommendations made in August 1996 by the Defense Science Board, which urged DOD to move aggressively to outsource most of the support functions currently performed by the department. The DSB called for elimination of statutory and regulatory impediments to outsourcing.

## Offer/Proposal v. Other Information

MICOM's **Diane Beam**, DSN 788-0545, was asked for her opinion on a concept whereby a distinction is made with regard to an "offer/proposal" versus "other information", the combination of which comprises a response to a competitive solicitation.

Ms. Beam's answer concludes that the proposal is inconsistent with the FAR, primarily because of the definition of "discussion". Thus, it is inconsistent with the FAR to make this distinction to allow communications with offerors, and not conclude that these are discussions (Encl 6).

## Estimates for Requirements Contracts

TACOM's **Wendy Saigh**, DSN 786-5191, has prepared a memo on the above-captioned subject, stressing the importance of retaining data and documentation used in developing the estimated quantities for requirements contracts. The information should be part of the contract file so that it is readily available to effectively oppose a contractor's allegation that the government negligently estimated the quantity (Encl 2).

Court and GAO case precedent on this issue is provided for the practitioner.

# Employment Law Focus

## Honey, I Shrunk the Government!

Under the provisions of the 1994 Federal Workforce Restructuring Act, the OPM reports that agencies have reduced employment by 308,624. Voluntary Separation Incentive Payments (VSIP “buyouts”) are credited for the successful effort to reduce with limited involuntary separations — 27,000.

- DOD VSIP buyouts - 92,432
- Non-DOD VSIP - 36,035
- Of those receiving buyouts
  - 53% were eligible to retire, average age 61.
  - 40% ret. early, avg. age 53
  - 7% resigned, avg. age 44

## Official Time...

### ...for Union Reps.

DAPE's **David Helmer** continues to provide Department of the Army labor counselors with important information, including a paper outlining the historical basis for official time, beginning with President John F. Kennedy's Executive Order 10988, January 17, 1962 through the Civil Service Reform Act of 1978, which provided a statutory framework for the federal labor management relations program. (Encl 8).

## Hearsay-Credibility-Suitability

In Woodward v. OPM, MSPB No. DA 073295065211 (Apr. 18, 1997), the Board ruled that although hearsay is admissible in MSPB hearings, the weight given may vary, and may not support the burden of proof (“preponderance of evidence”) applicable to OPM suitability determinations. The Board concluded that the AJ did not fulfill requirements to determine credibility as set forth in Hillen v. DA (1) identify the fact/evidence in dispute; (2) summarize the competing positions; (3) determine which side is credible; and (4) state the reasons for the credibility determination.

### ...to Lobby Congress

The Federal Labor Relations Authority ruled in US Army Corps of Engineers and NFFE Local 259, 52 FLRA 920, that the agency violated the parties' collective bargaining rights by denying an employee request for official time to lobby Congress. Because the employee lobbying related to the representation of unit employees, it fell within the definition of “representational activities,” for which official time is intended.

## Distributing Union Literature

As a result of the ruling in SSA and NTEU and AFGE, 97-1204 (D.C. Cir. Mar 21, 1997) the Federal Labor Relations Authority has developed a new framework for determining when a rival union can distribute literature on agency premises. No longer will the Authority decision be focused only on whether the rival union had attained “equivalent status”. Instead, the proper inquiry under 5 USC 7116(a)(3) is whether an agency has “sponsored, controlled, or assisted a labor organization”.

In applying this standard to the case at bar the Federal Labor Relations Authority said that denial of the distribution did not amount to unlawful interference, denial of employee rights or discriminatory treatment. The union was shown to have a reasonable alternative means of communicating with agency employees.

### MSPB Award of Attorneys Fees Without Jurisdiction

Reversing the precedent of Shaw v. Navy, 39 MSPR 586 (1989), the MSPB has ruled in Joyce v. Air Force (MSPB Docket No. PH0752950085A1, April 3, 1997) that employing agencies may be liable for attorneys' fees incurred even in cases where the MSPB lacks subject-matter jurisdiction, because the agency granted appellant relief without the

Board having to issue a decision.

In overruling the Shaw principle that a fee claimant had to establish Board jurisdiction, the new rule says that an appellant only present a prima facie case of jurisdiction — a non-frivolous allegation of fact relating to jurisdiction that would otherwise entitle the appellant to a Board hearing.

### Interviews, Notices of Depositions, Subpoenas, and Other Requests or Orders

CECOM's **Kim Melton**, DSN 992-1146, provides a paper on the requirements of AR 27-40, Litigation, to obtain written approval of the appropriate SJA or legal advisor prior to disclosing information in response to a subpoena, court order or notice of deposition.

Additionally, even in private litigation (in which the US has no interest) the legal office should be consulted if the testimony involves official information, the witness is to testify as an expert, or the absence of the witness from duty will interfere seriously with the accomplishment of the military mission (Encl 16).

The Assistant Secretary of the Army for Manpower and Reserve Affairs has made significant changes to existing policy, including deregulation and streamlining procedures.

Functional Chief Representatives are granted authority to delegate review of outreach/recruitment plan reviews to the first GO/SES member above the selecting official.

The AMC DCSPER has command responsibility to review affirmative action packages prior to review by functional representatives (Encl 9).

### Successorship or Accretion

In a reorganization where two activities, each represented by a separate union, combine into a single unit, there is frequently a dispute as to which union, if any, represents the work force.

The merging union argues that it retains exclusive representation status since the new employer is the successor organization.

The union for the gaining activity claims the bargaining unit of the merging activity accretes into its unit.

Bulletin 401 examines case law including the recent decision of Navy and AFGE, announcing standards and criteria applicable to this recurring issue (Encl 10).

# Environmental Law Focus

## Environmental Fines & ERA

Occasionally, a military installation will be required to pay a stipulated penalty or fine relating to an environmental clean up activity. In the past, the Military Services were authorized to pay fines arising out of an activity funded by the Defense Environmental Restoration Account (DERA).

As a result of a new statutory provision, the use of environmental restoration ac-

count funds to pay these types of fines must now be specifically authorized by law. See 10 USC Section 2703(e). Based on this language, it appears that use of environmental restoration accounts to pay fines or penalties will require specific authorization from Congress. **Bob Lingo**, DSN 767-8082 or **Stan Citron**, DSN 767-8043 can be contacted for additional information.

## Munitions Rule Implementation Update

The Military Services have been working with the states to implement the EPA's Munitions Rule (MR). The first MR partnering meeting between the Military Services and States was held in early May. In addition, the DoD Regional Environmental Coordinators have conducted MR informational briefings for many of the states regulators. Based on these meetings, it appears that many states support the MR, but most states will not be able to complete the administrative rule making process to adopt the MR prior to the effective date of the EPA Munitions Rule (12 Aug 97). The

Military Services will continue to work this issue.

In a related matter, an environmental group (the Military Toxics Project) filed a petition for judicial review of EPA's Munitions Rule in the federal court on 6 May 1997. The MTP is challenging (1) the definition that munitions fired on ranges are not waste and (2) the transportation and storage conditional exemption provisions. At this point, DoD is proceeding with its Munitions Rule implementation Plan (i.e., Partnering Initiative, REC Munitions Rule briefings to states, etc.). For additional information contact **Stan Citron**, DSN 767-8043.

## Lead-Based Paint Concerns on BRAC Properties

How should lead-based paint concerns be handled on Army BRAC installations? EPA has variously asserted that lead-based paint which has chipped off of structures is a CERCLA release of a hazardous substance which the Army must immediately remediate as a condition of transferring the land. Background and the EPA Region IX legal opinion may be found in the DENIX Defense Environmental Alerts, <http://denix.cecer.army.mil/denix/DOD/News/Pubs/DEA/29Jan97/03.doc.html>.

The Army disagrees. Releases of lead-based paint from the exterior of buildings due to weathering is not a release of a hazardous substance to which the Army must respond under CERCLA. Nonetheless, if there is a threat posed by the lead-based chips, or if a regulator raises the issue, it should be addressed on a site-by-site basis, under other authorities, in order to minimize risk.

Enclosed (Encl 13) is an update, prepared by **Colleen A. Rathbun** of the U.S. Army Environmental Center which provides guidance as to the present Army position.

## Environmental Law Division Bulletins

ELD Bulletin for April and May 97 are provided (Encl 11 and 12) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version. They, as well as previous ELD Bulletins, are also accessible at the AMC Command Counsel Website. ©

## Regulatory Concurrence on CERFA Clean Parcel Determinations

DoD Policy is that a CERCLA 120(h)(4) clean parcel covenant can only be given if regulatory agencies concur with the "uncontaminated" determination, otherwise the CERCLA 120(h)(3) covenant must be used. This is particularly significant for the preparation and review of Findings of Suitability to Transfer. For a full discussion of the revised DoD Environmental Condition of Property Classifications, based on the revised definition of uncontaminated property by deleting reference to storage, and clarification of the DoD policy on regulatory concurrence, see <http://www.dtic.dla.mil/envirodod/brac/unconta.html>. A copy of this material may be obtained by calling **Bob Lingo**, DSN 767-8082. ©

## Quadrennial Defense Review (QDR)

Assuming that the overall defense budget remains constant in the future, the QDR report finds that 109,000 military and civilian positions will be required to be eliminated, in order to ensure funding of the procurement program and ensure technological superiority.

The report recommends reducing infrastructure personnel and costs by:

- outsourcing selected Defense Logistics Agency functions, including cataloging, and increasing competition for disposal and physical distribution;
- re-engineering Defense Financial Accounting Service operations;
- outsourcing selected patient care, medical training, and installation support in the Defense Health Program;
- consolidating the 16 large information processing centers run by the Defense Information Service Agency into six centers;
- re-engineering business processes at the Defense Investigative Service by streamlining the security investigative process and implementing service fees;
- combining operational commands and outsource monitoring activities at the On-Site Inspection Agency; and
- reducing funding for most other defense agencies and activities by 6 percent.

The report proposes to reorganize the military infrastructure by:

- reducing logistics support costs by integrating organizations and functions now performed at multiple locations and reducing inventories and operating costs;
- conducting public-private competitions to non-core depot maintenance work where other outsourcing criteria are met;
- reducing layers of oversight at headquarters and operational commands, eliminating obsolete positions, and consolidating some support infrastructure outside the United States; and
- competing, outsourcing, or privatizing military infrastructure functions that are closely related to commercial enterprises, such as logistics and installation support functions. ©

## Ethics Focus

### Non-Federal Entities

CECOM's Ethics Team has prepared a treatise on the important subject, addressing treatment of personal and official relationships, with specific can do's and don'ts. The article provided is an extract from a writing by DA Standards of Conduct Office counsel **Mike Wentink**. The treatment by the Joint Ethics Regulation of conflicts of interest, endorsement, cosponsorship and participation are all covered by this very important paper (Encl 14).

### Restrictions on Unofficial Teaching, Speaking, and Writing Activities

The Office of Government Ethics has issued guidance, in conjunction with the Justice Department, on partial nonenforcement of 5 CFR part 2635 (2635.807a), resulting from the case of Sanjour v. US, 56 F.3d 85 (D.C. Cir. 1995).

In short, the policy addresses the prohibition on acceptance of travel expenses for unofficial teaching, speaking and writing that is consid-

ered "related to duties" under section 2635.807 (a)(2)(i)(E)(2).

Pending the district court's issuance of a final order on remand in Sanjour and until further notice, OGE asks you to advise employees that this prohibition will not be enforced against executive branch employees other than "covered noncareer employees", as defined in 5 CFR 2636.303(a)(Encl 15).

## Looking for a New Job? Watch Out!

### Restrictions and Disqualifications Lurk Everywhere

*by the CECOM Office of Counsel*

#### When Job Hunting:

A. If seeking employment with a company, you are disqualified by law and regulation from participating in any official matter that affects the company (even if someone else makes the final decision). Written notice of this disqualification is often required.

B. "Seeking employment" includes sending a resume or not rejecting outright an unsolicited inquiry. If you tell a company representative who contacts you that you

have to wait until next month to discuss the possibilities, you are "seeking employment" now. Sending blanket resumes to industry or asking for a job application would not be "seeking employment." Also, if you send a resume to a company and do not hear anything for two months, you are no longer "seeking employment."

C. Under the new procurement integrity law (effective 1 January 1997), if you are participating personally and substantially in a procurement

and are contacted by a bidder or offeror before award, you must give written notice to your supervisor and Ethics Counselor.

D. Letters of recommendation on official letterhead may be obtained from other government employees who have dealt with you in the course of your government job and who have personal knowledge of your ability or character.

E. Travel expenses for job interviews. You may accept

*continued on next page.....*

# Ethics Focus

## ...Employment Restrictions Continued

such expenses from potential employers, including a DoD contractor, in connection with job interviews. To avoid the appearance of a conflict of interest, the cost of the accommodations should be customary in such situations. For those required to file a financial disclosure report (SF 278 or SF 450), travel expenses totaling \$250 or more must be included on these reports.

**Terminal leave.** Remember you are still on active duty, and you cannot represent any non-Federal entity before the Federal Government while on terminal leave.

In CECOM those required to file a financial disclosure report must also have written permission of their agency designee to work during terminal leave. Your agency designee is the first supervisor in your chain who is a commissioned military officer or a civilian GS12 or above.

### Post-Government Employment Restrictions.

A. Switching sides. If you participated personally and substantially in a particular matter, you may never represent someone else back to the Federal Government on the same particular matter.

B. Switching sides. If a particular matter(s) was under your official responsibility

during your last year of service, you may not represent someone else back to the Federal Government for two years on the same particular matter(s).

C. Former general officers and senior employees (SES Level V and up) are prohibited from representing someone else back to their agency for one year concerning any matter, even if they were never involved in it.

D. Under the new procurement integrity law (effective 1 January 1997), PMs, Deputy PMs, contracting officers, and others involved with \$10+ million contracts may not accept compensation from the contractor for a period of one year after serving in such capacity for the Government; others include members of the source selection evaluation board, the chief of the financial or technical evaluation team, and the source selection authority for \$10+ million contracts. Also restricted are those who make the decision to award a task order or delivery order of \$10+ million.

E. The new provision cited immediately above does not prohibit working for a division or affiliate of the contractor who does not produce the same product or services.

## Miscellaneous Military Provisions.

A. Use of Title. Retirees may use military rank in private commercial or political activities, but retired status must be clearly indicated, there must be no appearance of DoD endorsement, and the use must not discredit DoD.

**Wearing the Uniform.** Retirees may wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays.

They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions (AR 670-1, para. 29-4).

## Ethics Advice and Counsel.

Before sending a resume or pursuing an employment contact, you may seek the advice of your organization's Ethics Counselor. Contact the CECOM Legal Office, SJA Division, (908) 532-4444. ©

## The New HQ AMC Ethics Team

With the arrival of **Mike Wentink** to the General Law Division as head of the Ethics Team, we extend our thanks to **Alex Bailey** for the fine work he accomplished during the extended time he was Acting Chief. ©

# Faces In The Firm

## Congrats!

### ARL

**Freda Krosnick**, Chief, Intellectual Property Law Branch, ARL was this year's recipient of the Della Whittaker Memorial Award. This award is presented annually by the Adelphi Chapter of Federally Employed Women to honor the women who are outstanding role models for the career committed women. Freda was chosen as this year's winner, recognizing her outstanding qualities and dedicated performance in the past and potential for the future.

### TACOM-ARDEC

On 10 March 1997, **Mr. Robert J. Parise** accepted a Certificate of Appreciation on behalf of TACOM-ARDEC from the Secretary of the Army, Mr. Togo D. West, Jr., for acquisition streamlining initiatives related to the CRUSADER program.

### TACOM

Messrs., **Robert Maskery** and **Ronald Majka** of the TACOM-Wrn Business Law Division were awarded the Achievement Medal for Civilian Service in Jun 97.

## Arrivals and Departures

### Arrivals

#### HQAMC

The General Law Division welcomes **Mike Wentink** who will be Ethics Team Leader, after serving several years with the DA Standards of Conduct Office.

**Major Cynthia Mabry** reported to the Business Law Division in early June.

#### CECOM

**MAJ Marvin Gibbs** is the new Deputy SJA, arriving from the Contract Appeals Division.

#### MICOM

**1lt Erika A. Cain** joined the Office of Staff Judge Advocate in April after completing the basic course at The Judge Advocate General's School.

### Departures

#### ATCOM

**Suzanne Sammons**, transferred to Huntsville, Alabama.

**CPT Paul Salussolia**, PCSd to Panama.

#### MICOM

**CPT David H. Estes** departed from the Office of SJA and active duty on 6 May 1997. He is working as a prosecutor in the Alabama Attorney General's office in Montgomery, Alabama.

**CPT David J. Goetz** will be leaving the Office of SJA in June for his next assignment which will be in Vilsek, Germany.

**MAJ Charles L. Green**, Deputy SJA will be leaving in July to attend the LLM program in environmental law at Lewis & Clark in Portland, Oregon.

#### TACOM

**Paul Robinson** of the TACOM-Wrn Business Law Division has resigned from Government Service on 23 May 97 to take a contract position overseas sponsored by the ABA.

**Allen Kalt** of the TACOM-Wrn Business Law Division retired from Government Service on 3 Jun 97. Upon his retirement he was awarded the Achievement Medal for Civilian Service. Good luck and best wishes to you.

#### CECOM

The current Deputy SJA, **Major Margaret Talbot-Bedard**, will be departing CECOM and Fort Monmouth o/a 3 Jul 97 to attend the Command and General Staff College at Fort Leavenworth.

**CPT Alvin Jeff Ifrah**, the Chief of Military Law, will be departing CECOM o/a May 97 to be assigned to the SJA Office at Fort Stewart.

# Faces In The Firm

## Promotions

### IOC

Mr. **David C. DeFrieze** of IOC has been promoted to a GS-14 Attorney Advisor at the U.S. Army Industrial Operations Command. With the promotion, Dave has returned to the Acquisition Law Division. ©

## Intern Program

The IOC Office of Counsel will be hosting an Intern through the HACU (Hispanic Association of Colleges and Universities) Intern Program. Mr. Jedrick Burgos arrives at the IOC on Wednesday, 4 June. Mr. Burgos, a Chemical Engineer attending Law

School in Puerto Rico, will be focusing on Intellectual Property Law and Environmental Law. Mr. Burgos will be at IOC until early August. We look forward to participating in the Intern Program and hope it's a beneficial learning experience for Mr. Burgos. ©

## In Memory...

**Ms. Jean McCarthy**, who served as the paralegal in the U.S. Army Materials Technology Laboratory and U.S. Army Research Laboratory - Watertown, Massachusetts, passed away May 28 in Nashville, Tennessee, where she underwent a second liver and kidney transplant within one week. For the past two years, Ms. McCarthy had waited for the double transplant and following a first attempt approximately one week ago, it was necessary to again replace her liver and kidney.

Ms. McCarthy began working in Watertown while still in high school. Following college graduation (summa cum laude), she continued to work at Watertown for a total of 18 years when she was medically retired two years ago when it became necessary to seek transplant operations. Prior to her retirement, she completed the Bentley College paralegal program. During her time at Watertown, she received

many honors and awards including the Commander's Award for Civilian Service, Secretary of the Year, and Professional Technician of the Year.

In lieu of flowers, donations may be made to the William Rizzo Community Foundation, P.O. Box 762, Natick, MA 01760, phone (508) 651-2418. The Rizzo Foundation provided significant support to Ms. McCarthy during her wait at Nashville. ©

## Surprise!

Mary Grace Patterson of surprised her parents, **Sharon** (MICOM Branch A, Acquisition Law Division) and Guy, on 1 April 1997 by arriving in this world two months early. She weighed in at 4 pounds, 5 1/2 ounces and is doing fine. ©

## Cards & Letters:

The AMC Personnel Notes section of the Newsletter is an important component supporting efforts to see each other as individuals rather than "just" employees. We hope you take the time to report developments in the lives of the members of the firm. One suggestion: in reporting retirements please provide specifics--length of service, accomplishments, and retirement plans. ©

# Automation

## Supplement

by John Klecha

## Return of the Automation Supplement

After a hiatus of several months to oversee the conversion of our TACOM Legal Office automation system to Windows95 and MS-Office suite, the Automation Supplement is back. We hope to again bring you useful information concerning all aspects of legal office automation.

### Initial Testing of "CoolTalk" a success - FREE phone calls!

As one of the items on the AMC Command wide Legal Office Automation Committee's plate, CPT Joe Edgell, AMC Legal Office, initiated a test with yours truly to evaluate the effectiveness of a product called "CoolTalk" which allows for free interactive voice communication between any number of users at their PC's.

The set up requires that you have a sound card, preferably capable of full duplex communication, and a PC microphone. Joe and I were able to communicate quite well despite the fact that I couldn't get my end to operate on full duplex (meaning both people can speak and hear at the same time). Once we realized that we had to speak and then wait for a response, we got it going pretty well. Still to be evaluated is a Microsoft product called NetMeeting 2.0.

Will report more on this in the future but initial indications seem to point to the very real possibility of free long distance phone capability for AMCer's with the right PC equipment.

**T**o satisfy an urgent requirement to improve communications between TACOM's three geographically separated offices (Warren, Picatinny and Rock Island) Ms. Verlyn Richards, TACOM Chief Counsel, asked that we investigate the application of the latest technology in solving this problem. What we came up with is a restricted access (login ID and password needed) TACOM legal office Intranet homepage that allows for the sharing of information in a matter of minutes between the three legal offices. (See Attachment 2 for a copy of the top menu.)

As can be seen, it is already being used to share litigation status information on Appeals, Protests and Claims (although Claims and Appeals are still being worked on).

In addition to the Web Site Directory mentioned above, the Intranet homepage also has an extensive e-mail directory, a listing of TACOM's Command Legal Program (CLP) initiatives, memoranda of note from our professional staff, environmental bulletins, procurement fraud updates, electronic briefings, and copies of the Command Counsel's Newsletters.

Under development and soon to be added will be interactive screen forms so that all users within

TACOM can trade information in real time as well as sending reports up to AMC Legal using the web and Lotus cc:Mail.

In a parallel effort, the TACOM DOIM is also setting up a separate, command-wide corporate IntraNet for all employees of TACOM. As part of this effort, the DOIM has decided to eliminate Lotus cc:Mail Bulletin Boards in favor of Web based Bulletin Boards for each TACOM Business Center. Users will simply access their browsers and click on a few hot spots to get to the Bulletin Boards. This office intends to aggressively use the TACOM Legal Office Bulletin Board as an outreach tool to all the clients served by the office in accomplishing mission. Because the site is HTML based, it will allow for the inclusion of graphics as well as text based material in our efforts to improve service to and communication with our customers.

# AMC Legal Office Web Sites

Since the last supplement was written, AMC legal offices have begun establishing a web presence. Legal Offices now on the web are:

**AMC Legal Office:** [http://amc.citi.net/amc/command\\_counsel/](http://amc.citi.net/amc/command_counsel/)

**TACOM Legal Office:** <http://www.tacom.army.mil/Legal/index.htm>

**STRICOM Legal Office:**  
[http://www.stricom.army.mil/stricom/command\\_group/counsel/](http://www.stricom.army.mil/stricom/command_group/counsel/)

Crawl over and check them out. As you will see, you can even download the Command Counsel's Newsletter from the AMC site. Think of the trees we're saving! Seriously, a lot of good information is available with much more to come as we all move out of the initial development stage on these sites.

## LegalLinks available

For those with Web access, I've created a handy Web Site Directory called "LegalLinks" that can be loaded on your own machine or on your local server and pointed to with your browser. It's free for the asking and you can update it to suit your own needs. (For a look at what it has to offer, see attachment 1 for a peek at the top menu page of the package.) Just email me and I will send you the files.

## DoD Acquisition Deskbook

If you want to get the very latest from the DoD Acquisition Deskbook (DAD) and don't want to install it locally or fool with the CD-ROM, you can now access the DAD on line. All this requires is that you install the DAD viewer on your system. It is just under 2 Megabytes and is available free from the DAD Web Site at: <http://deskbook.osd.mil/>

Set it up in minutes and you're ready to go!

## Coming in future issues...

✌ LAAWS BBS software

✌ Updated E-Mail Directories

✌ Finally, access to AR's - the how to's and where's

✌ The restructured automation committees

✌ More Web Stuff

**White Paper**

**Recommendations for the  
Bid Protest Group  
of the  
United States Court of Federal Claims  
Advisory Council**

**Submitted by the**

**Inter-Agency Working Group on  
Federal Court Disappointed Offeror Litigation**

**April 1, 1997**

Encl 1

MEMORANDUM FOR

SUBJECT: ESTIMATES FOR REQUIREMENTS CONTRACTS

In light of the present emphasis on the use of requirements contracts, it is necessary to stress the importance of retaining the data and documentation used in developing the estimated quantities for these requirements contracts. This is essential in order to effectively oppose a contractor's allegation that the government negligently estimated the quantity. This information should be included as part of the contract file so that it is readily available in the event that a dispute/claim should arise in the future.

Despite the fact that requirements contracts typically contain clauses which warn that the estimated quantities are only estimates and are not a guaranteed quantity, a judicial exception has been created by the Court of Claims and the boards of contract appeals in order to provide the contractor with a remedy. Atlantic Garages, Inc., GSCBA No. 5891, 82-1 BCA ¶15,479 at 76,707 (Nov. 28, 1981). The Court of Claims held in Womack v. United States, 380 F.2d 793, 800-01, 182 Ct. Cl. 399, 413 (1968), that:

An estimate as to a material matter in a bidding invitation is an expedient. Ordinarily it is only used where there is a recognized need for guidance to bidders on a particular point but specific information is not reasonably available . . . . Intrinsically, the estimate that is made in such a circumstance *must be the product of such relevant underlying information as is available to the author of the invitation.* If the bidder were not entitled to so regard it, its inclusion in the invitation would be surplusage at best or deception at worst. Assuming that the bidder acts reasonably, he is entitled to rely on Government estimates as representing honest and informed conclusions. . . . In short, in promulgating an estimate for bidding-invitation purposes, the Government is not required to be clairvoyant but it is obligated to base that estimate on all relevant information that is available to it.

(Emphasis supplied; citations omitted.)

The courts and boards have utilized two different standards in determining whether the Government was negligent. At times a standard of due care was used and at other times a good faith standard was used. Nevertheless, Atlantic Garages points out that "[r]egardless of which test is applied, the issue is whether defective or improper Government conduct has resulted in an estimate that misrepresents the work to be performed by the contractor; if it has, then the Government is liable for the consequences." Id. at 76,708. Furthermore, while requirement contracts typically place the risk that the quantities may vary on the contractor, this risk does not include the possibility that the Government negligently determined the estimated quantity. If the Government can establish that the estimate was formulated by the "best method reasonably available," then the fact that the actual quantities differed will not result in liability on the part of the Government. Id. at 76,710.

The burden of proof is on the contractor to prove that the estimate is in fact negligent. "The fact that the estimate may have proved to be wide of the mark does not mean that this error is per se, a misrepresentation." Marine Construction & Dredging, Inc., 95-1 BCA ¶27,286 at 136,008 (Oct. 31, 1994). The Marine Construction Board further stated that "the mere existence of a significant disparity between the estimates and the actual quantities does not of itself serve as the basis for sustaining a claim of lack of due care or lack of good faith in the preparation of the estimate." Id. at 136,009. However, once the contractor establishes prima facie evidence of negligence in developing the estimate, the burden will shift to the Government to show it acted with due care or good faith. The Government will be required to prove that their estimate was based on relevant and reliable information and that the Government

conducted an adequate inquiry into the requirements it would need under the contract. Without the back-up documentation for the estimate, the government will have an extremely difficult time proving this.

In the event that the contractor is able to meet its burden of proof and the government is unable to show the estimate was not negligent the contractor will be entitled to a remedy for breach of contract.<sup>1</sup> See Womack, supra. The purpose of damages for breach of contract is to compensate the injured party for the loss caused by the breach. The idea is that the damages are intended to give the injured party the benefit of the bargain by awarding the sum of money that will place that party in the same position it would have been in had the contract been performed fully. Cramer Alaska, Inc., ASBCA 47725, 1995 ASBCA LEXIS 283, at \*11 (October 11, 1995). See also, Atlantic Garages, supra. (Government's negligent estimate in a requirement contract resulted in recovery of breach of contract damages.)

Most commonly, contractors have been entitled to lost profits minus any costs the contractor saved due to not selling the units (i.e. labor, storage, etc.). In addition to lost profits, it should also be noted that the Board has previously held that a contractor was entitled to recover costs associated with building a new factory when the Government breached a requirement contract. Inland Container v. United States, 512

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<sup>1</sup>It should be noted that prior to the passage of the Contract Dispute Act of 1978, 41 U.S.C. §§ 601-13 (Supp II. 1978), the boards of contract appeals lacked jurisdiction over claims that did not arise under the contract (i.e. breach of contract claims). Atlantic Garages, 82-1 BCA at 76,711. Thus, as an alternative, when faced with a breach of a requirements contract, the boards would often find relief for contractors under the Termination for Convenience Clause. Under the Contract Dispute Act, however, the boards are now entitled to grant any recovery that the Court of Claims is authorized to grant. 41 U.S.C. § 607(d) (Supp II 1978).

F.2d 1073, 206 Ct. Cl. 478 (1975).

It is imperative that the back-up data and documentation used to create the estimated quantity be retained in the contract file in order to effectively establish that the government had a sound rationale for reaching the amount used in the contract. Failure to retain this information may result in numerous judgments in favor of the contractor, not because the estimate was truly negligent but because the government is unable to show otherwise.

Wendy S. Sage

Capturing Discretion to Thwart Possible Court Challenge  
Vera Meza

Many, many decisions made by contracting personnel during the solicitation process involve the exercise of discretion based on advice received from supporting personnel. When those decisions are challenged at either the agency, GAO or court, one generally thinks that the challenge will fail; for we are given lots of leeway in exercising our discretion.

I'd like to suggest, though, that we not be lulled into thinking that when we exercise our discretion that it will always be judged to be reasonable. Why won't it be judged to be reasonable? Because the contemporaneous documentation in the contract file does not always adequately capture the thought process behind the exercise of discretion. This makes it easy for opposing counsel to argue that discretion was exercised in an arbitrary or capricious manner. This note concerns withstanding challenges to our discretionary decisions filed at a district court or the Court of Federal Claims by following an arbitrary, practical rule.

If the contemporaneous documentation in the record isn't enough to make the government's case, then we will request permission from the court that the record (i.e. contract file or GAO Administrative Report) be supplemented. If we ask for supplementation then we have opened the door to discovery by the opposing side. Of course, the opposing side is going to want to have access to the same government personnel that are supplementing the record for the government. The opposing side will want to depose them. This happened in *Cubic Applications, Inc. v. U.S.*, 37 Fed. Cl. 345 (1997). Yech, yech, yech. I see the ball of string unraveling.<sup>1</sup>

Here is an example of the exercise of discretion involving denial of a waiver for first article test and the contemporaneous documentation problem about which I am concerned. The quality specialist provided a memo to the contracting officer stating:

Generally we do not recommend PCO waive the FAT requirement, unless the contractor has been in continual or recent production or has successfully passed FAT on the item in approximately a year or so. Since X does not meet either of these criteria, I do not recommend that you waive FAT requirement.

For this particular item, X received FAT approval three years ago. There were no changes to the technical data nor reports of quality deficiencies in the items provided by X. Of course, if FAT had been waived, X would have been the awardee.<sup>2</sup>

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<sup>1</sup> I am not worried about GAO cases because we do supplement the record without unraveling the string; depositions are not taken in GAO cases. I also do not believe that GAO hearings necessarily cause unraveling because, again, the opposing side has not been able to depose our witnesses.

<sup>2</sup> Has the government ever lost a protest involving denial of a waiver for FAT? Yes, the government has. See *Airline Instruments, Inc.*, B-223742, November 17, 1986, 86-2 CPD 564.

The advice given by the quality specialist to the contracting officer appears to be unbending and automatic. Nevertheless, I suspect that there are valid reasons behind the quality specialist's advice to the contracting officer. The thoughtful aspect of the quality specialist's advice might have shown up in the next couple of sentences.

We might think that the record could be easily supplemented by getting an affidavit from the quality specialist or contracting officer to show the reasonableness of the decision. But what if we open the door to depositions by us and the opposing side of the quality specialist or contracting officer. As I said before, yech, yech, yech.

The current view of the Court of Federal Claims on what constitutes the administrative record and discovery is that

the parties must be able to suggest the need for other evidence, and possibly limited discovery, aimed at determining, for example, whether other materials were considered, or whether the record provides an adequate explanation to the protester or the court as to the basis for the agency's action. It follows that discovery as well as the breadth of the court's review has to be tailored in each case.<sup>3</sup>

How can we limit the need to supplement the record? My first rule is to require the main paragraph<sup>4</sup> in the document conveying advice to the contracting officer to be at least four sentences long. The intent of this simplistic, arbitrary rule is to trigger the real reason behind the advice given to the contracting officer. The contracting officer should receive more than a summary decision as advice. She has to knowingly exercise her discretion.

My hope is that by applying an arbitrary rule--four sentence explanations for advice given--that we will eliminate or at least minimize the need to supplement the record should we wind up in the Court of Federal Claims. This will also help at the GAO because we could file more summary judgment-like motions and try to get the cases dismissed.

I haven't come up with a second practical rule yet that might minimize the need to supplement the record. Try the first practical rule. It may help improve the tons of advice that the contracting officer receives and must act upon.

Feedback is welcomed. I'll pass all comments on to the protest pod here at HQ, AMC.

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<sup>3</sup> *GraphicData LLC v. U.S.*, COFC, No. 97-256C, May 9, 1997, citing *Cubic Applications, Inc. v. U.S.*, 37 Fed. Cl. 345 (1997).

<sup>4</sup> I define the main paragraph as the one with the bottom line recommendation to the contracting officer; the one that an opposing party would question.

31 March 1997

## MEMORANDUM FOR Acquisition Center

SUBJECT: New Developments in Task and Delivery Order Contracting

1. Protests against orders issued under task order contracts or delivery order contracts are limited by the Federal Acquisition Streamlining Act of 1994 (FASA), P.L. 103-355, to those filed on the basis that the order increases the scope, period, or maximum value of the contract. In an effort to balance that limitation on industry's right to protest, FASA provides that a "Task and Delivery Order Ombudsman" will review complaints from contractors in each agency that uses multiple award task order or delivery order contracts to ensure that all awardees receive a fair opportunity to be considered for task or delivery orders issued under the contract. The legislation provides, at 10 U.S.C. 2304c(e) and 41 U.S.C. 253j(e):

Each head of an agency who awards multiple task or delivery order contracts...shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required...

2. A contractor may bring a complaint to the Task and Delivery Order Ombudsman if it believes that an acquisition does not conform with the terms of FAR Subpart 16.5 which prescribes the policies and procedures for making awards of indefinite-delivery contracts and "establishes a preference scheme for making multiple awards of delivery order contracts and task order contracts." Subpart 16.503(d) significantly limits the use of requirements type contracts for advisory and assistance services by directing that no solicitation for a requirements contract for such services in excess of three years and \$10,000,000 (including all options) may be issued unless the contracting officer or other official designated by the head of the agency determines in writing that the

AMSEL-LG-CM

SUBJECT: New Developments in Task and Delivery Order Contracting

services required are so unique or highly specialized that it is not practicable to make multiple indefinite-delivery, indefinite-quantity (IDIQ) awards using the procedures in 16.504.

3. Except in those situations where the contracting officer or other official designated by the agency has determined the services to be necessarily incident to, and not a significant part of, the contract, the "multiple award preference" set forth at FAR Subpart 16.504(c) applies. The general preference at 16.504(c)(1) states

...the contracting officer shall, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources...If an indefinite-quantity contract for advisory and assistance services exceeds three years and \$10,000,000, including all options, multiple awards shall be made unless-

(A) The contracting officer or other official designated by the agency determines in writing, prior to the issuance of the solicitation, that the services required under the task order contract are so unique or highly specialized that it is not practicable to award more than one contract. This determination may also be appropriate when the tasks likely to be issued are so integrally related that only a single contractor can reasonably perform this work;

(B) The contracting officer or other official designated by the head of the agency determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(C) Only one offer is received.

SUBJECT: New Developments in Task and Delivery Order Contracting

If an indefinite-quantity contract for advisory and assistance services will not exceed three years and \$10,000,000, a contracting officer may, but is not required to, give preference to making multiple awards.

5. FASA gives contracting officers broad discretion in determining the procedures for providing contractors fair opportunity in competing for orders (in excess of \$2,500) issued under multiple delivery order contracts. Factors such as past performance, quality of deliverables, cost control, price, cost or other factors that the contracting officer, in the exercise of sound business judgment, believes are relevant may be considered. The procedures chosen by the contracting officer to insure fair opportunity to compete and the selection criteria must be set forth in the solicitation and contract. The competition requirements of FAR Part 6 need not be met; however, agencies may not use any method that would not result in fair consideration being given to all awardees prior to placing each order. Exceptions to the requirement to provide all offerors a fair opportunity to compete are set forth at FAR Subpart 16.505(b)(2), and include urgency, efficiency and satisfying guaranteed minimum order quantities.

6. In the one reported decision involving failure to comply with the FASA requirements for advisory and assistance services contracts, the General Accounting Office (GAO) upheld the protest of Nations, Inc. against the Army's Request for Proposals (RFP) contemplating award of a single requirements type contract rather than multiple indefinite-delivery, indefinite-quantity (IDIQ) type contracts for professional technical services in support of battlefield simulation training (Nations, Inc., B-272455, 1996 U.S. Comp. Gen. LEXIS 547; 96-2 Comp. Gen. Proc. Dec., 170). The protester alleged that a requirements type contract was precluded where, as here, the agency had not made a determination that the services were so unique or highly specialized that it was not practicable to make multiple IDIQ contract awards. The Army did not dispute the requirement to make such a determination where applicable, but asserted that training support services did not meet the definition of "advisory and assistance" services. GAO cited FAR Subpart 37.201 in its decision that training services did, in fact,

SUBJECT: New Developments in Task and Delivery Order Contracting

fall within the definition of "advisory and assistance" services, and stated further that

the umbrella-type task order contract to be awarded under this RFP appears to be the kind of contract targeted by Congress under FASA; the solicitation contemplates the award of a single contract for virtually all of the Army's requirements for support of computer simulation training at a large number of facilities throughout the United States. The Senate report regarding the relevant statutory provisions expressed a concern that:

"...the indiscriminate use of task order contracts for broad categories of ill-defined services necessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can be effectively addressed...by awarding multiple task order contracts for the same or similar services..."

S. Rep. No. 103-258, 103d. Cong., 2d Sess. 15 (1994).

7. GAO held that because the training support services met the definition of "advisory and assistance" services set forth at FAR Subpart 37.203 (revised by FAC 90-41), the RFP was defective. The Comptroller General recommended that the Army either amend the solicitation to provide for the award of multiple IDIQ type contracts, or execute the necessary determination that the services sought were so unique or of such a highly specialized nature that it would not be practicable to make multiple awards. It was also recommended that the Army pay Nations, Inc.'s costs of filing and pursuing its protest, including reasonable attorneys' fees.

8. GAO's decision in Nations, Inc., Id., illustrates a point made by John Cibinic in The Nash and Cibinic Report, Vol.10, No.1, January 1996. Mr. Cibinic stated his opinion that

Agencies have much to gain by making the ombudsman or agency protest approach work. Fighting protests consumes great amounts of time and money.

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SUBJECT: New Developments in Task and Delivery Order Contracting

9. The Task and Delivery Order Ombudsman for the Department of the Army is the Deputy Assistant Secretary of the Army (Procurement), Dr. Kenneth J. Oscar, who is also the Army's Competition Advocate General. AMC's Competition Advocate, Ms. Sandra Rittenhouse, and CECOM's Special Advocate for Competition, Ms. Michelina Darcy LaForgia, also serve as the Task and Delivery Order Ombudsman at their respective commands.

10. Point of Contact for this action is Michelina Darcy LaForgia at X25056.

11. CECOM Bottom Line: THE SOLDIER.

//s//

KATHRYN T. H. SZYMANSKI  
Chief Counsel

## MEMORANDUM FOR Army Materiel Command Attorneys

SUBJECT: Federal Court Protective Orders: When Are Counsel's Contacts Too Many?

1. **Introduction:** Recently, the U.S. Court of Federal Claims, Judge Horn, excluded a private attorney's access to proprietary and source selection sensitive information under a bid protest protective order. Hydro Engineering v. U.S., No. 96-564C, 1997 U.S. Claims LEXIS 51 (Fed. Cl. March 10, 1997). Specifically, the Court excluded the attorney after it found

... a significant risk of disclosure or inadvertent disclosure due to [the attorney's] existing and past, direct and indirect relationships with individuals and companies involved in, or potentially involved in, the procurement at issue, or in future related procurements.

Id., at \*10 - \*11. Although the Court's determination was very fact-specific, its analysis and conclusions are similar to the current protective order standard before the GAO. In short, the Court's action was based on following three areas of concern:

- (1) the attorney's intimate contacts with a potential competitor;
- (2) the attorney's pre-proposal representation of a potential competitor; and
- (3) the attorney's unwillingness to sever such contacts in future related procurements.

2. **Contacts:** Regarding the first area of concern, the attorney maintained a personal and professional relationship with two principals in a corporation related to the plaintiff's subcontractor. The first principal was the attorney's brother. The second principal was a corporate officer of both the subcontractor and the related corporation. Moreover, the Court noted that the attorney had not revealed these contacts in his application for admission to the protective order in the predecessor bid protest before the GAO. Id., at \*11.<sup>1</sup>

3. **Pre-Proposal Representation:** In addition, the Court found that the attorney "represented [the plaintiff's subcontractor] during the formation of a proposal to be submitted in the procurement . . . ." Id. In this regard, the attorney wrote a letter

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<sup>1</sup> The GAO also denied the attorney's admission to the protective order. See Hydro at \*7.

AMSCB-GC

SUBJECT: Federal Court Protective Orders: When Are Counsel's Contacts Too Many?

to the Contracting Officer, on behalf of the subcontractor, about various intended contractual requirements.<sup>2</sup> In addition, the subcontractor wrote approximately four pre-proposal letters to the Contracting Officer, apparently "copy furnishing" the attorney.

4. **Future Representation:** Finally, the Court noted that the attorney "indicated an unwillingness to sever any future relationships with potential or future offerors on procurements related to the one at issue." *Id.* Although the Court clearly considered this fact in reaching its decision, we cannot know whether the Court's decision would have been different had the attorney sworn off such future relationships.

5. **Practice Recommendation:** This case involved a small business. Its attorneys were solo or small-firm practitioners not involved routinely in a government contract practice. Prior to releasing sensitive information pursuant to a U.S. Court of Federal Claims protective order, government counsel should take reasonable steps to determine the nature and extent of an unfamiliar attorney's representation. Depending on the nature of the attorney's association with his or her client, there could be a heightened risk of inadvertent disclosure of protected material.



LISA SIMON  
Attorney-Advisor

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<sup>2</sup> It was this correspondence upon which the GAO, in part, based its exclusion of the attorney from its protective order:

The record establishes that [the attorney] has communicated with the agency on behalf of [the protester's subcontractor] concerning the procurement which is the subject of this protest. In his October 13, 1995, letter to the agency, [the attorney] inquired about how [the subcontractor] was to respond and comply with various specifications in the solicitation . . . . Based on [the attorney's] letter, we believe that [the attorney] was engaged in competitive decision making on behalf of [the subcontractor].

Hydro at \*7 - \*8.

## MEMORANDUM FOR AMSMI-GC-AL-A/Diane Beam

SUBJECT: Request for Legal Opinion Regarding "Offer/Proposal" versus "Other information"

1. Reference the following:

- a. "Offer" is the same as "proposal" (FAR 52-215-5)
- b. "Offer" is response to a solicitation that, if

accepted, would bind the offeror to perform the resultant contract (FAR 2.101)

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2. I am interested in pursuing a concept whereby a distinction may be made with regard to an "offer/proposal" versus "other information"; the combination of which comprise a response to a competitive solicitation. This concept would be utilized by including a special provision in the solicitation as follows:

a. (1) OFFER (PROPOSAL) Each offeror must submit an offer (proposal). The offer shall consist of the following items: (1) Standard Form 33, with blocks 12 through 18 completed by the offeror; (2) RFP Section B, the schedule of items and prices, with the offeror's proposed prices inserted in the appropriate blank spaces; and (3) RFP Section K, certifications, representations, and other statements, completed by the offeror. The submission of these items to the Government will constitute the offeror's promise to comply with the terms and conditions of

the RFP, which include the statement of work, at the proposed prices.

(2) with the exception of clarifications (FAR 15-601) and corrections of mistakes (FAR 15.601), communication with offerors and resulting revisions of the offer (if any) regarding the above shall be considered discussions as defined at FAR 15.601 and 15.610.

b. (1) OTHER INFORMATION. Each offeror must submit other information as set forth at L. "Instructions for Submission" of Offer/Proposal and Other Information". This information will not constitute a part of an offer and will not become a part of any contract resulting from this solicitation, unless the government and an offeror agree to make it a part of an offer through discussions.

(2) communication with offerors and any resulting revisions submitted by offerors shall not be considered discussions as defined by FAR 15.601 and 15.610.

Information as set forth at L. "Instructions for Submission"

3. The items listed in a.(1) offer/Proposal above should be modified in cases where it is determined that other items should be made part of the resulting contract (such as key personnel).

4. The purpose of this proposed concept is to streamline the process by allowing communication with Offerors regarding those aspects of a response to a solicitation which are not "binding promises" and which will not become part of the resulting contract. For the most part this information concerns the offeror's capability to perform the required effort (**i.e.**, past performance, sample tasks, management plans, technical approach, etc.).

S. I will note that there are currently communications other than clarifications and correction of mistakes that do NJ fall under the rules of discussions. Some of these include site visits, discussions with OCAA auditors and pre-award surveys.

I would like to have your opinion in time to incorporate into the upcoming solicitation for the Command Analysis Directorate.

If this is not possible, I still would be very much interested in pursuing this concept for future actions.

7. Please call the undersigned at 2-7404 if you have any questions.

DANA E. HOLMES

Ch, Mission Service Support Branch

MEMORANDUM FOR AMSMI-AC-CFH/ Dana Holmes

SUBJECT: Request for Legal Opinion Regarding "Offer/Proposal" versus "Other Information"

PROPOSED CONCEPT: A distinction may be made between an "offer/proposal" and "other information" to allow communications with offerors concerning, and revisions to, "other information" that are not considered discussions. (The "offer" is: Standard Form 33 with Blocks 12 through 18 completed; RFP Section B, the schedule of items and prices, with proposed prices inserted; RFP Section K, certifications and representations, and other statements, which will constitute the offeror's promise to comply with the terms and conditions of the RFP, which include the statement of work, at the proposed prices. The "other information" will not constitute a part of the offer and will not become a part of any contract resulting from the RFP, unless it is agreed to make it a part of the offer through discussions; it primarily concerns the offeror's capability to perform the required effort--past performance, sample tasks, management plans, technical approach, etc.)

1. The proposed concept, which distinguishes between an "offer/proposal" and "other information" for the purpose of allowing communications with offerors regarding "other information" and revisions to this "information" which are not considered to be discussions, is not

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consistent with the current Federal Acquisition Regulation (FAR) and its supplements. This primarily is because of the way that "discussion" currently is defined. According to FAR § 15.601, "discussion" includes communication between the Government and an offeror that "involves information essential for determining the acceptability of the proposal" (emphasis added.).

2. Both the FAR and the Army FAR Supplement (AFARS) clearly indicate that the technical, cost, and past performance information are necessary for determining the acceptability of a proposal. (FAR @ 15.605(a) addresses "the factors and subfactors that will be considered in evaluating proposals" (Emphasis added.), and FAR § 15.605(b)(1)(ii) requires evaluation of past performance for all solicitations with an estimated value in excess of: \$ 1,000,000 if issued on or after 1 July 1995; \$500,000 if issued on or after 1 July 1997; and \$100,000 if issued on or after 1 January 1999. FAR § 15.605-0 provides that in awarding a cost-reimbursement proposal, "[t]he primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals ..." (Emphasis added.). FAR § 15.608 (a)(3) addresses technical evaluation based on either "ensuring that the proposal meets the minimum requirements in the solicitation or an "[a]nalysis of the technically

acceptable and unacceptable proposals..." (Emphasis added.). FAR\_ 15.610(c)(5) recognizes that, as a result of discussions, the offeror may submit "... cost or price, technical, or other revisions to its proposal..." (Emphasis added.). AFARS§ 15.608 (a)(2)(i) provides that "...a comparative analysis of past performance records [discriminates] between otherwise acceptable offers" (Emphasis added.).) Because communication regarding this information "involves information essential for determine the acceptability of a proposal," it is, by definition, discussion.

3. Note also that in (b) of the clause at FAR S 52.215-13, entitled "Preparation of the Offer," is  
is  
the requirement that "[e]ach offeror shall furnish h the information required by the solicitation ' n.  
1This appears to indicate that the offer and, therefore, the proposal, is any 'information' **ion**  
required by the solicitation. (See FAR § 52.215-5, referenced in the Memorandum from AMSMI-  
AC-CFH, which states that "' [offeror means 'proposal' in negotiation."))

4. Based upon the above, it is the opinion of this office that it is inconsistent with the FAR and FAR supplements, as currently written, to make a distinction between the "proposal" and "other information" to allow communications with offerors, and resulting revisions, to not be considered as discussion. However, articles which address ideas similar to the proposed concept have done so primarily in discussing the draft of the FAR Part 15 "rewrite." Therefore, the concept may be considered again when the revisions to Part 15 of the FAR are issued.

Diane V. Beam  
Attorney Advisor

SUBJECT: Interpretation of DoD Handbook 5000.60-H, "Assessing Defense Industrial Capabilities (April 1996).

1. The DoD Directive "Defense Industrial Capabilities Assessments" (DoD Directive 5000.60) and accompanying Handbook "Assessing Defense Industrial Capabilities" (DoD 5000.60-H) were issued in April of 1996 as a framework and guideline to evaluate the need for DoD action to preserve defense industrial capabilities. The Handbook is mandatory for use by all DoD components (see Handbook "Foreword" by Paul G. Kaminski, Under Secretary of Defense, dated April 25, 1996). Since it was issued, there has been some confusion regarding when and how to apply the Handbook.
2. The Handbook requires a detailed "Handbook Analysis" and various high level approvals for "all actions or investments to preserve a capability". For all ACAT programs, all such actions or investments of *less than* \$10 Million annually must be approved by the Component Acquisition Executive(CAE) or Defense Acquisition Executive (DAE) as defined in DoD 5000.2-R. For all other products or programs, all such actions or investments of *less than* \$10 Million annually must be approved by the Head of the Contracting Activity (HCA). For all programs or products (ACAT and non-ACAT) any such action or investment of \$10 million or *more* annually must be approved by the USD(A&T). All such investments or actions to preserve a capability require a Handbook analysis.
3. The Handbook and Directive seem unclear as to what is considered an "action" and whether the terms "procurement" and "action" are synonymous. If they are synonymous, any decisions to restrict competition for mobilization base reasons (every exception 6.302-3(a)(2)(i) based J&A - an "Exception 3" J&A), for procurements over \$10 million, would require USD (A&T) approval and the associated Handbook analysis. During a recent acquisition action, I had the opportunity to seek some clarification of the Handbook from representatives from OSD who were instrumental in developing the DoD Handbook.

4. The PEO, GCSS in conjunction with AMC, DA and OSD had formed an IPT to prepare a J&A for the M795 program (PM SADARM) using "Exception 3" to limit competition to the U.S. and Canada. During that IPT process, the issue of how to interpret the Handbook was raised with a representative from OSD (an assistant to Mr. John B. Goodman, Deputy Under Secretary of Defense, Industrial Affairs & Installations). He was asked whether the Handbook language meant that every exception 6.302-3(a)(2)(i) based J&A had to have a Handbook industrial capabilities analysis and be approved in accordance with the Handbook. He explained, based on internal discussions within DoD at the time the Directive/Handbook were coordinated, that the terms were NOT intended to be synonymous.
5. He went on to explain (in a subsequent memo) that the J&A threshold on restrictions for mobilization base reasons is based on the value of the total procurement. He stated that it would be difficult if not impossible to quantify the price penalty (the value of the intervention action or investment) DoD pays by restricting competition for mobilization base reasons; and, in any event, such a decision is based on national security, not economic, factors. The threshold reflected in the Directive/Handbook is meant to apply to the value of a discrete action or investment (or discrete series of actions or investments) to preserve an endangered capability. These actions or investments could represent the sum total of a procurement or, more usually, a part of a larger procurement. In other words, the action or investment dollar threshold contained in the Directive/Handbook represents the value of the intervention itself. The dollar threshold for mobilization base restrictions represents the value of the procurement, not the value (cost penalty) to the procurement that arises from the domestic source requirement.
6. During our discussions, two examples of when the Handbook would be applicable were cited: (1). You are acquiring a supply in an ACAT program, but also acquire \$3 Million worth of unique equipment to lay away in order to preserve the industrial capability for that supply. That action would require a Handbook analysis and approval; and (2). You have an acquisition for \$79 Million worth of "powder" but that includes \$11 Million worth of powder that will be stockpiled. That action would be subject to the Handbook.
7. Please remember that this interpretation is NOT applicable to the Feb. 1995, USD(A&T) issued policy guidance stating that a decision to exclude foreign sources from a solicitation for mobilization base considerations (a restriction to U.S. and Canada) may be approved only

by the USD(A&T) for procurements over \$50 million. This guidance specifically applies to procurements and not just "actions or investments" and, therefore, must be complied with in all such J&A's that meet the \$50 Million threshold.

8. In view of the above interpretation of the Handbook, every J&A based upon CICA exception 6.302-3(a)(2)(i) need NOT be staffed and an industrial capabilities analysis need NOT be performed in accordance with the Handbook. In fact, it is likely that very few would require such analysis and special staffing. There may be J&A's and proposed acquisitions that include a "discrete investment ..." and may fall within the definition of an "action" subject to the Handbook. In such cases, these actions should be forwarded to the servicing Legal office for assistance in determining the applicability of the Handbook.

Denise C. Scott  
Counsel  
AMSTA-AR-GCP  
TACOM-ARDEC  
Picatinny Arsenal, N.J.

## **Official Time for Union Representatives**

### **Executive Order 10988, “Employee-Management Cooperation in the Federal Service,” January 17, 1962 (President John F. Kennedy), 3 CFR 521 (Comp. 1959-63)**

E.O. 10988 established broad government-wide labor relations policy in 1962 for the first time. With respect to official time for union representatives, it required that, whenever practicable, union representatives be on official time when consulting or otherwise meeting with management representatives.<sup>1/</sup> Agencies had discretion to determine the amount of official time union representatives would receive. Agencies could require that negotiations be conducted during the non-duty hours of the union representatives. In this regard, the framers of the Order wanted management to be able to require that employee representatives negotiate on their own time if the time required for negotiations became burdensome.<sup>2/</sup> No internal union business could be conducted on duty time.

### **Executive Order 11491, “Labor-Management Relations in the Federal Service,” October 29, 1969 (President Richard Nixon), 3 CFR 861 (Comp. 1966-70)**

E.O. 11491 superseded E.O. 10988. It continued the official time policies of E.O. 10988 except with respect to official time for union representatives when negotiating an agreement with agency management. E.O. 11491 specifically prohibited official time for union negotiators.<sup>3/</sup> This was based on a finding that the policy under E.O. 10988 of permitting official time for union negotiators had led to a wide divergence of practice among agencies in granting official time which resulted in inconsistent treatment of employees and, in some instances, to the protraction of negotiations over a period of many months.<sup>4/</sup>

### **Executive Order 11616, “Labor-Management Relations in the Federal Service,” August 26, 1971 (President Richard Nixon), 3 CFR 605 (Comp. 1971-75)**

E.O. 11616 amended E.O. 11491. It continued the official time policies under E.O. 11491 except that it modified that Order to eliminate the prohibition against official time for employees engaged as union representatives in negotiations with agency management.<sup>5/</sup> It permitted the parties to negotiate official time for such union representatives up to a maximum of 40 hours or a maximum of one-half the total time spent in negotiations during regular working hours. It also provided that the number of union negotiators should not exceed that of management negotiators. The change in policy was based on the finding that the present policy had some unfavorable effects on the negotiating process (e.g., difficulties in scheduling negotiating sessions, delays in completing negotiations because of a union’s inability to provide representation) although the policy had some beneficial effects such as better advance planning and preparation for negotiation meetings, and more efficient use of meeting time. The new policy was designed to enlarge the

scope of bargaining and promote responsible negotiations while avoiding undue hardship or delay in negotiations.

**Executive Order 11636, “Labor-Management Relations in the Federal Service,” December 17, 1971 (President Richard Nixon), 3 CFR 634 (Comp. 1971-75) and Executive Order 11838, “Labor-Management Relations in the Federal Service,” February 6, 1975 (President Gerald R. Ford, 3 CFR 957 (Comp. 1971-75)**

E.O. 11491 was amended twice again by E.O. 11636 and E.O. 11838. These new Orders made no change in policy with regard to official time for union negotiators.

**Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat 1111 et. seq. (October 13, 1978)**

Title VII of the Civil Service Reform Act of 1978 provided a statutory basis for the federal labor relations program for the first time.<sup>6/</sup> It specifically provided that, except as provided below, official time for union representatives was to be determined between the parties through negotiations.

The Act removed the constraints on official time for union negotiators which then existed under E.O. 11491. It required that employees representing a union in negotiations be given official time during the time the employee is otherwise in a duty status. It continued the limitation that the number of union negotiators on official time not exceed the number of management negotiators. The Act also continued the prohibition against granting official time for internal union business. It allowed the Federal Labor Relations Authority to determine whether any employee participating for, or on behalf of a union in any proceeding before the Authority should receive official time.

## Endnotes

1. Section 9 of E.O. 10988 provided as follows:

Section 9. Solicitation of memberships, dues, or other internal employee organization business shall be conducted during the non-duty hours of the employees concerned. Officially requested or approved consultations and meetings between management officials and representatives of recognized employee organizations shall, whenever practical, be conducted on official time, but any agency may require that negotiations with an employee organization which has been accorded exclusive recognition be conducted during the non-duty hours of the employee organization representatives involved in such negotiations.

2. *Report of the President's Task Force on Employee-Management Relations in the Federal Service*, " November 30, 1961, Section III.H., at page 20.

3. Section 20 of E.O. 11491 provided as follows:

Section 20. Official Time. Solicitation of membership dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management.

4. *Report and Recommendations on Labor-Management Relations in the Federal Service*, August 1969, section E.7.

5. Section 20 of E.O. 11491, as amended, now provided as follows:

Section 20. Official Time. Solicitation of membership dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives.

6. *Report and Recommendations on the Amendment of Executive Order 11491*, August 1969, section D.

7. The Civil Service Reform Act of 1978 created 5 U.S.C. 7131 which provides as follows:

**§7131. Official Time.**

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section--

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
111 ARMY PENTAGON  
WASHINGTON DC 20310-0111

March 10, 1997



MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Senior Civilian Affirmative Outreach and Recruitment  
Policy (GS-15)

This policy memorandum amends Assistant Secretary of the Army (Manpower and Reserve Affairs) memorandum of September 23, 1988, subj: Senior Executive Service (SES) Affirmative Action Policy; DACS-ZD message (Oct 88) 261700Z, subj: SES and GS/GM-15 Affirmative Action Policy; and DAPE-CPE memorandum (18 Jan 89), same subject. The following provisions apply to all GS-15 competitive selections, to include local merit promotions and centralized career referrals.

Since 1988 the Army has charted an ambitious course to overcome barriers to professionally advancing candidates for senior level appointment. Now, as then, the goal is an "equal employment opportunity (EEO)" environment. Although representational gains have been made, statistics show we must continue to ensure that all qualified candidates are equitably considered for promotions to SES "feeder" grades. With this in mind, I would like to clarify my requirements for GS-15 selections.

Commanders at all levels are ultimately accountable for EEO processes and are obligated to ensure full compliance with affirmative outreach and recruitment policy.

Selecting officials, by their decisions, directly affect the composition of our work force. To ensure a wide applicant pool and meaningful EEO progress, selecting officials must:

- a. Review outreach and referral documents to satisfy themselves that reasonable effort was made to attract a full complement of qualified candidates, to include minorities, women, and individuals with disabilities.
- b. Document fully justifiable reasons for selection on DA Form 2600, Referral and Selection Register or DA Form 2302-2-R, Civilian Career Program Referral Record.

c. Report selection statistics according to procedures established by their functional chief (FC) or personnel proponent.

Functional chiefs and personnel proponents must work to foster broad-based employee representation. They are to critically monitor outreach, referral, and selection activities. Most importantly, they are charged with intervening when either the letter or the spirit of EEO policy is in question. As stewards of fairness, they are to:

a. Advise selecting officials, in writing, to ensure that they understand their accountability for EEO and responsibility for reporting requirements.

b. Review GS-15 referral lists and supporting recruitment/outreach plans prior to referral of candidates to the selecting official.

c. Participate directly in the selection process by serving on interview or selection panels, when appropriate.

As they execute their mandate, FC and proponents may (1) personally review all documents relating to the hiring process; (2) delegate review authority to the FC representative; or (3) delegate review authority to an SES member/general officer (GO) at either the MACOM level or at local sites of hire. If none is available at a local site, documents will be reviewed and forwarded to the FC or personnel proponent by a senior executive or GO in the selecting official's chain of command.

I will review command-specific and Army-wide representational statistics and confer with commanders, activity heads, FC, and personnel proponents as appropriate. Under separate cover you will receive guidance for submission of semiannual referral and selection reports.

Requirements for the SES remain unchanged. Functional officials will continue to review referral lists and proposed selections to ensure that all SES candidates have been fully and fairly considered.

The Army Leadership remains committed to EEO. I encourage all responsible officials to improve our representational standing by taking an active and personal interest in selections for high grade civilian positions.

A handwritten signature in black ink that reads "Sara E. Lister". The signature is written in a cursive, flowing style.

Sara E. Lister  
Assistant Secretary of the Army  
(Manpower and Reserve Affairs)

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MILITARY TRAFFIC MANAGEMENT COMMAND  
EIGHTH US ARMY

CHIEF, NATIONAL GUARD BUREAU



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
200 STOVALL STREET  
ALEXANDRIA, VIRGINIA 22304-0300



May 30, 1997

MEMORANDUM FOR LABOR RELATIONS SPECIALISTS AT MACOMS,  
OPERATING CIVILIAN PERSONNEL OFFICES,  
CIVILIAN PERSONNEL ADVISORY CENTERS,  
INDEPENDENT REPORTING ACTIVITIES AND  
CIVILIAN PERSONNEL OPERATIONS CENTERS

SUBJECT: Successorship or Accretion--Labor Relations  
Bulletin No. 401

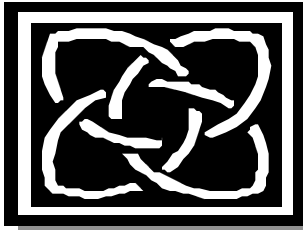
In a reorganization where two activities, each represented by a separate union, combine into a single unit, there is frequently a dispute as to which union, if any, represents the combined work force. The merging union argues that it retains exclusive representation of its employees since the new employer is a successor organization. The union for the gaining activity (or the gaining activity itself) claims the bargaining unit of the merging activity accretes into its unit. Resolution of these types of disputes cannot be accomplished by the parties as questions of representation are left to the sole discretion of the Federal Labor Relations Authority (the Authority.)

While the Authority determines representation issues on a case-by-case basis, its decision process is not a surreptitious endeavor. In United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia and American Federation of Government Employees, Local 53, AFL-CIO, et.al., 52 FLRA No. 97 (1997), the Authority provides the analysis it will use in deciding representational matters where a reorganization raises questions of successorship and accretion. Of course, even knowing the Authority's analysis will not guarantee that you'll be able to predict with certainty how the Authority will decide on any given case; *but after all, isn't that what makes labor relations such an exciting field?*

The attached bulletin provides a summary of the above decision. Please share this bulletin with your Civilian Personnel Officer, Labor Attorneys and other interested management officials.

<signed>  
Elizabeth B. Throckmorton  
Chief, Policy and Program  
Development Division

Attachment



# *Labor Relations Bulletin*

**No. 401**

**May 30, 1997**

## **Successorship or Accretion**

How many times have you been faced with a situation where your employees are being merged with another organization represented by a different union and your managers want to know which union will represent the employees in the new organization? If this has never happened to you, consider yourself lucky. For those who have had the distinct "pleasure" of being in this situation, you know how difficult it is to provide a definitive answer to representational questions. *(The bright side, of course, is that halfway through any in-depth explanation you give of the representational process, half your audience will be sound asleep, anyway.)*

Well, for those of you actually facing this situation, the Authority has come to your rescue with its recent decision detailing how it will process disputes concerning successorship and accretion stemming from an agency's reorganization. United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia and American Federation of Government Employees, Local 53, AFL-CIO, et.al., 52 FLRA No. 97 (1997) (FISC).

Of course, even after reading this decision, you can't be assured of knowing with the utmost certainty how the Authority will rule on a given reorganization since each decision is made on a case-by-case basis. The FISC decision, though, should provide the background necessary for knowing which factors are important and how they will be applied by the Authority in determining union representation after an agency reorganizations.

## What is Successorship and Accretion

For the Authority's FISC analysis to be applicable, there must be a reorganization resulting in a representational dispute involving questions of successorship and accretion. Before addressing the Authority's analysis, let's briefly take a look at what successorship and accretion mean.

As an example, assume Command B, whose employees are represented by Union B, is merging into Unit A, whose employees are represented by Union A. Union A would argue that the employees represented by Union B have **accreted** into the new bargaining unit represented by Union A and that Union B is no longer the employees' representative. On the other hand, Union B would argue that employees from Unit B remain a separate bargaining unit within the new organization and the employees remain represented by Union B. That is, Union B would claim that the new agency is a **successor** employer and it must recognize Union B as the exclusive representative of the employees transferred to the new agency.

Looked at another way, **successorship** is where a union keeps representation of its employees even after the employees have been reorganized into a new employing entity. **Accretion** involves the addition, without an election, of a group of employees to an existing bargaining unit. If the merging employees were represented by a union, that union would no longer be the employees' exclusive representative.

## Determining Successorship

After a reorganization, a union files a petition claiming the new entity is a successor organization. How does the Authority make this representational determination?

In Naval Facilities Engineering Service Center, Port Hueneme and National Association of Government Employees, Local R12-28, et. al., 50 FLRA No. 56 (1995) (Port Hueneme), the Authority detailed three factors it will evaluate in determining whether, after a reorganization, a new employing entity is the successor to the previous one such that a secret ballot election is not

necessary to determine that the previous representative continues to represent the transferred employees. (Now *that's a mouthful.*) The Authority held that a gaining entity is a successor employer, and a union retains its status as the exclusive representative when:

(1) An entire recognized unit, or a portion thereof, is transferred and the transferred employees: (a) are in an appropriate bargaining unit, under section 7112(a) of the Statute, after the transfer; and (b) constitute a majority of the employees in such unit;

(2) The gaining entity has substantially the same organizational mission as the losing entity, with the transferred employees performing substantially the same duties and functions under substantially similar working conditions in the gaining entity; and

(3) It has not been demonstrated that an election is necessary to determine representation.

With regard to this last requirement, the Authority has rarely directed an election where successorship or accretion has been appropriate. Where an election would be appropriate is when, after a reorganization or consolidation, the number of unrepresented employees in the gaining entity exceeds the number of represented employees. Another situation where an election may be necessary after a reorganization is when more than one labor organization represents employees transferred into the new, appropriate, unit.

#### Determining Accretion

The Authority doesn't have such a neat test for determining accretion. In U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base and American Federation of Government Employees, Local 1138, 47 FLRA No. 53

(1993), the Authority stated it was bound by the criteria for

determining the appropriateness of a bargaining unit set forth in section 7112(a)(1) of the Statute for determining whether a unit accretes into an established unit. The Authority may determine a unit to be appropriate only if the determination will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency; and (3) promote efficiency of the operations of the agency involved.

In a little more detail, the three factors are:

1. **Community of Interest:** Unfortunately, the Authority has not specified the individual factors or the number of such factors needed to establish that a clear and identifiable community of interest exists. It is the totality of the circumstances that allows it to make its decision (on a case-by-case basis.) Briefly, community of interest involves a commonality of sharing of interests between the employees in a unit. The Authority will look to see if the employees in the proposed unit are part of the same organizational component of the agency, support the same mission, are in the same chain of command, have related job titles and are subject to the same working conditions. Other factors such as geographic proximity, unique conditions of employment, and distinct local concerns are all factors that are considered in determining a community of interest.

2 & 3. **Effective Dealings and Efficiency of Operations:** Rarely are these two factors addressed in any detail in appropriate unit decisions. Normally, the Authority considers both factors together in rendering its findings. Absent significant countervailing factors, though, if the evidence demonstrates that employees in a proposed unit share a clear and identifiable community of interest, the unit will generally be found to promote effective dealings with, and the efficient operations of, the agency. The Authority may look to see what impact the make-up of the unit would have on the agency's budget (would one unit be more economical than many separate units?), whether there was a single personnel office and did the units operate under the same labor relations guidance.

The Authority, in rendering a decision on accretion (and

appropriate bargaining units) is not finding a unit as being **the most appropriate unit**. Rather, it is simply finding that the proposed unit is an appropriate unit.

#### Successorship or Accretion--How Does The Authority Decide?

Now that we all fully understand the concepts of successorship and accretion, the question arises, "What does the Authority look at when, after a reorganization, one union claims the impact of the reorganization results in a successorship organization and the other union claims it results in an accretion?"

In FISC, the Authority adopted the following framework when resolving cases arising from a reorganization where employees are transferred to a pre-existing or newly established organization [known as the gaining organization] and both successorship and accretion principles are claimed to apply:

(1) Initially, [the Authority] will determine whether employees who have been transferred are included in, and constitute a majority of, a separate appropriate unit(s) in the gaining organization under section 7112(a). The outcome of this inquiry will govern whether successorship or accretion principles should next be applied.

(2) If it is determined that the transferred employees are included in a separate appropriate unit(s) in the gaining organization under section 7112(a), and if they constitute a majority of the employees in that unit(s), [the Authority] will apply the remainder of the successorship factors set forth in Port Hueneme with respect to the unit(s) determined to be appropriate. The outcome of the Port Hueneme analysis will determine whether the gaining organization is a successor for purposes of collective

bargaining with the labor organization(s) that represented the transferred employees at their previous employer.

(3) If it is determined that the transferred employees are not included in, and constitute a majority of employees in, a separate appropriate unit in the gaining organization, [the Authority] will apply [its] long-established accretion principles. The outcome of this analysis will determine whether the transferred employees have accreted to a pre-existing unit in the gaining organization.  
[FISC, at 958-59]

Lets take a look at the application of this framework.

Obviously, the first step that must occur is a reorganization where at least two organizations have merged and there are claims of both successorship and accretion. Next, a representation petition(s) must be filed to alert the Authority of the situation. In response to the petition(s), the Authority will determine whether the transferred employees are included in a separate appropriate unit in the gaining organization and whether they constitute a majority of the employees in that unit. As stated above, this determination is not whether the unit is the most appropriate unit, but whether it is an appropriate unit.

This finding can be particularly disheartening to the agency. Most management officials prefer a single command-wide unit within an installation rather than many smaller units. (This is not true with regard to tenant activities where it is beneficial to keep each tenant command in a separate unit.) Under FISC, the Authority will first see if the transferred employees can make up a smaller appropriate unit instead of determining whether they can more appropriately fit into the pre-existing unit. This can create a real problem of unit fragmentation.

The determination of whether the transferred employees make an appropriate unit is similar to the first factor in Port Hueneme. A unit is appropriate only if it will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved. All three factors are to be given equal weight by the Authority.

If the Authority finds that the transferred employees constitute a majority of the employees of a separate appropriate unit in the gaining organization, it will then determine whether the remaining factors in the Port Hueneme decision have been met. If the Port Hueneme factors are met (the gaining entity has substantially the same organizational mission as the losing entity, with transferred employees performing substantially the same duties and functions under similar working conditions in the gaining entity and it has not been demonstrated that an election is necessary to determine representation), the Authority will find the organization to be a successor organization for that unit.

On the other hand, if it is found that the transferred employees do not constitute an appropriate unit, the representation petition seeking successorship will be dismissed and the Authority will then consider the accretion claim. If the "transferred employees are functionally and administratively integrated into the gaining organization's pre-existing unit(s), and that adding the transferred employees to the unit(s) would be appropriate under section 7112(a), an accretion will be found." (FISC, at 963.)

As with successorships, accretions also require appropriate unit findings as defined in section 7112(a) of the Statute.

Clearly, the Authority has decided that it will provide first consideration to a request for successorship over a request for accretion. While the Authority does not state why it considers successorships before accretions, its reasoning can probably be found in the arguments submitted by the unions and the General Counsel in the FISC case. There, the parties claim:

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...a finding of successorship permits a union to retain its status as the exclusive repre-

sentative of employees who have been acquired by a new employer. They further point out that a finding of accretion places the acquired employees in a new unit, usually with a different representative, thereby altering the relationship between the employees and the exclusive representative they had previously selected. ...[A]n approach that considers successorship first is "consistent with the Authority's goals of minimizing collective bargaining instability and preserving collective bargaining relationships whenever possible."  
[954.]

One union also argued that accretions result in the acquired employees being deprived of their previously negotiated benefits. While we can't be sure how much of this the Authority agreed with, the overall argument was apparently persuasive.

#### Applying FISC

The first application of the Authority's reasoning as detailed in FISC is, as you probably could guess, the FISC reorganization. Employees of FISC were stationed in Norfolk and Cheatham, Virginia. AFGE, Local 53 and IAM, Local 97 each represents employees in both Norfolk and Cheatham. The reorganization merged Yorktown employees, represented by NAGE, R4-1 and Charleston employees, represented by AFGE, Local 2298, as two new detachments under FISC. As a result of the reorganization, the two new detachments now report up the chain of command to the Commanding Officer of FISC; they no longer report to the Commanding Officers of their respective stations.

The agency filed a petition seeking to clarify the FISC unit so that the Yorktown and Charleston employees would accrete into the established FISC units. NAGE R4-1 filed a petition arguing that the activity's Yorktown Detachment is a successor employer which must recognize NAGE as the exclusive representative of the

employees who were transferred from the Yorktown Station. AFGE Local 2298's petition sought an election for its unit members.

Using the FISC analysis, the Authority first decided whether separate units, comprised of Yorktown and Charleston Detachment employees, are appropriate in accordance with 5 USC § 7112(a).

#### Community of Interest

The Authority found the functions of the two new detachments are similar to the functions performed by the gaining FISC detachments. The employees are all subject to the same personnel policies with labor relations services administered by the same personnel office. Positions held by the employees of the new detachments are similar to those held by the other unit employees in FISC.

Based on the above, the Authority concluded that neither the Yorktown nor Charleston Detachment employees share an identifiable community of interest separate and distinct from the employees in the existing FISC units.

#### Effective Dealings

The Authority determined that a separate unit of Yorktown or Charleston employees would not promote effective dealings. The directors of the detachments do not have authority for establishing policies, procedures or working conditions within their respective locations. All personnel functions are administered centrally from FISC headquarters.

#### Efficiency of Operations

If Yorktown and Charleston were found to be separate units, the cost of negotiating individual agreements would be substantial as would the cost of administering the agreements. These units would also result in artificial and unwarranted fragmentation of an integrated organizational structure.

As neither Yorktown nor Charleston constitute separate appropriate units under section 7112(a), the successorship petition was dismissed.

The next consideration was whether the two detachments accreted into the FISC units. The Authority determined, for reasons stated above, that the employees have been so organizationally and operationally integrated with the FISC employees that they have lost their separate identity. The Authority found that accreting the two detachments into the FISC units would promote effective dealings and enhance the efficiency of the activity's operations. The Yorktown and Charleston employees accreted into the FISC units.

### You Are Not Alone

Given the relative infrequency of representational issues arising at an installation, it's no surprise the majority of us lack any true expertise in this area. If you ever are confronted with a question of representation, you should immediately contact your labor attorney who can assist in the development of management's position. You can also raise questions to your MACOM and this office. Another valuable source is your Regional Director of the Federal Labor Relations Authority. That office should be able to assist the parties in formulating the specific issues concerning representational matters and, hopefully, expediting any required hearings.

Two of the best document sources of information concerning representational questions are the General Counsel's Representation Proceedings Hearing Officer Guide and its Representation Proceedings Case Handling Manual. Both of these documents can be obtained from the Superintendent of Documents. You can also receive an electronic copy of the Hearing Officer Guide by contacting David Helmer at DSN 225-4011 or by e-mail at "helmeda@asamrapol.army.mil". While questions of representation involve some of the more arcane areas in the Federal sector labor-management relations program, by using all your available resources, you should be able to get a pretty good handle on how the Authority will consider a particular representational dispute.

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### ***Final Military Munitions Rule: An Overview - LTC David Bell***

On February 12, 1997, the Environmental Protection Agency published the Military Munitions Rule (62 Fed. Reg. 6621), a rule that identifies when conventional and chemical military munitions become hazardous waste under the Resource Conservation and Recovery Act (RCRA). Military organizations that manage munitions must be prepared to implement this rule on August 12, 1997, the effective date.

The 1992 Federal Facility Compliance Act (FFCA) amended the Resource Conservation and Recovery Act (RCRA) by requiring the EPA to publish regulations that identify when munitions become a hazardous waste subject to RCRA. In developing its rule over the past four years, the EPA reviewed comments from numerous organizations and individuals, including DoD, other federal agencies, states, tribes, universities, corporations, and citizens' groups.

The Military Munitions Rule will primarily affect the Department of Defense, including the National Guard. Other federal agencies, such as the Department of Energy and U.S. Coast Guard, who deal with military munitions on behalf of the Department of Defense, will also be affected, as will government contractors who produce or use military munitions for the Department of Defense. Some parts of the rule, however, apply both to military and non-military activities. For example, the emergency response provisions, the new storage standards under Subpart EE, and the limited exemption from manifest and marking requirements apply to military and non-military alike.

The rule acknowledges that DoD has long-established and extensive storage and transportation standards that ensure explosive safety and security, while at the same time protecting human health and the environment. In drafting its rule, the EPA acknowledged that these DoD standards, developed and overseen by the Department of Defense Explosives Safety Board (DDESB), are at least as stringent as the RCRA standards. The EPA also relied upon the military's excellent safety record in its management of munitions and explosives, regardless of their status as a product or waste.

### State Authority

EPA has adopted the traditional RCRA approach to state authority and allows states to adopt requirements for military munitions that are more stringent or broader in scope than the federal requirements. At the same time, EPA strongly encourages states to adopt the provisions of this new rule. It remains to be seen just how states will seek to manage

waste military munitions. Nonetheless, in preparation for implementing the rule in August 1997, DoD has drafted an Interim Implementation Policy and distributed it to the field.

In the coming months, DoD will be working closely with installations, major commands, and regulators to identify issues and to seek consensus on a Final Implementation Policy. To assist states in understanding its munitions management practices, DoD has been engaged in a partnering effort with state, tribal, and environmental group representatives. This initiative will continue in an effort to persuade regulators to adopt the EPA rule and DoD's plan for implementing the rule.

DoD's Regional Environmental Coordinators (RECs) will support the partnering process by briefing regulators and facilitating discussions. RECs will also work closely with state regulators to assist in modifying state laws and regulations as may be necessary to adopt the EPA rule. Whether some states develop more stringent standards or not, the EPA rule has set forth a blueprint and significantly clarified the military waste munitions management requirements.

#### When Are Munitions A Waste?

The Rule addresses a fundamental question - when do unused military munitions, unused and used become a waste and thereby subject to the requirements of RCRA? The rule identifies four circumstances under which unused munitions become waste:

- when abandoned by being disposed of, burned, detonated, incinerated, or treated prior to disposal;
- when removed from storage for the purpose of being disposed of, burned, or incinerated, or treated prior to disposal;
- when deteriorated or damaged (for example, leaking or cracked) to the point that it cannot be put into serviceable condition and cannot reasonably be recycled or used for other purposes; or
- when declared a waste by an authorized military official (for example, the determination made by the Army concerning the M-55 rocket in 1984).

#### 40 CFR 266.202(b)(1) - (4)

In the case of "used or fired" munitions, EPA followed their long-standing position that deposit of a product on the ground incident to its normal and expected use does not trigger RCRA and indicated that some munitions can be expected to malfunction and not explode upon impact. In such circumstances, EPA has defined as solid waste those unexploded ordnance that are:

- transported off range or from the site of use for the purposes of storage, reclamation, treatment, disposal, or treatment prior to disposal;
- recovered, collected, and then disposed of by burial or landfilling, either on or off a range; or
- fired and land off-range and are not promptly rendered safe and/or retrieved.

#### 40 CFR 266.202(c)(1) - (2), (d)

Equally important, the rule also identifies specific circumstances under which military munitions are not waste. Notably, military munitions are not waste when used for their intended purpose:

munitions used in training military personnel or emergency response personnel, including training in the destruction of unused propellant; munitions used in research, development, testing, and evaluation activities; munitions destroyed during range clearance activities on active and inactive ranges; and unused munitions that are repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subject to materials recovery activities. Assignment of a particular condition code or placement in one of DoD's demilitarization accounts does not automatically result in designation of an item as a waste because many of these materials are subjected to recovery, reuse and recycling activities.

40 CFR 266.202(a)(1) - (2)

EPA has postponed final action on whether military munitions on closed or transferred ranges are solid waste until the Defense Department issues its Range Rule. The Range Rule, which DoD expects to propose this summer, sets forth a process for addressing unexploded ordnance and other contaminants at these ranges.

#### Storage Standards

EPA has finalized two approaches for the storage of waste munitions. The "conditional exemption" approach is available only for the storage of waste military munitions, while the new unit standards under 40 CFR Parts 264/265, Subpart EE, are available to military and non-military handlers of waste munitions and explosives.

The "conditional exemption" is based on EPA's determination that DoD's management practices make it unlikely that these waste munitions will be mismanaged and thereby present a hazard to human health and the environment. The conditional exemption allows non-chemical waste military munitions to exit the traditional RCRA regulatory scheme for hazardous wastes and, instead, be managed under a more tailored set of rules. Chemical munitions and agents are not eligible for the conditional exemption provision.

Additionally, for munitions to qualify for the exemption, they must be subject to the jurisdiction of the Department of Defense Explosives Safety Board (DDESB), managed in accordance with the DDESB's published standards (no waivers are allowed), stored in units identified to regulators, and inventoried annually and inspected quarterly. Theft, loss, or violations that may endanger health or the environment must be reported to the regulatory agency.

While a failure to meet any of the previously outlined conditions results in an immediate loss of the exemption, owners or operators may request reinstatement. This conditional exemption will greatly reduce the administrative burdens of storing waste military munitions, while providing regulators with the oversight and accountability they sought.

Under the second approach for storage of waste munitions, EPA set forth new unit standards in Subpart EE of 40 CFR parts 264 and 265, dealing with permitted and interim status facilities. Subpart EE requires that hazardous waste munitions and explosives (military or non-military) be stored in units that minimize the potential for detonation or

release; provide a primary barrier to contain the hazardous waste; and, in the case of liquid wastes, provide for secondary containment or a vapor detection system.

The storage unit must be monitored and inspected frequently enough to assure that controls and containment systems are working as designed. DoD storage units that satisfy DDESB standards should already meet the unit standards of Subpart EE. Unlike “conditional exemption,” owners and operators will also have to comply with RCRA’s other Subtitle C requirements, including the need to obtain a RCRA storage permit.

DoD anticipates that Subpart EE permits will be sought for units storing waste chemical munitions and agents, as well as for units storing conventional munitions that do not qualify for “conditional exemption,” e.g., because the storage unit requires a waiver from one or more DDESB standards.

### Transportation

In light of the extensive controls that DoD employs when transporting munitions, EPA has provided a limited exemption from RCRA’s transportation requirements. A RCRA manifest is not required for shipments of waste munitions and explosives (excluding chemical munitions and agents) between military entities. Such shipments must comply with DoD shipping controls, including the use of a Government Bill of Lading (GSA SF 1109), Requisition Tracking Form (DD Form 1348), Signature and Talley Record (DD Form 1907), Special Instructions for Motor Vehicle Drivers (DD Form 836), and Motor Vehicle Inspection Report (DD Form 626).

Military is defined broadly enough to include the “Armed Services, Coast Guard, National Guard, Department of Energy (DOE), or other parties under contract or acting as an agent for the foregoing, who handle military munitions.” The exemption also provides for similar reporting requirements as required under the storage exemption. This limited exemption, however, may be difficult to implement on a widespread scale until states, through which such shipments must travel, have adopted the provision as part of their state laws and regulations.

EPA also adopted a second exemption from the transportation requirements that is applicable both to military and non-military generators and transporters of hazardous wastes, including waste munitions and explosives. EPA has deleted the requirements for marking and manifesting hazardous wastes transported on a public or private right-of-way within or along the border of contiguous properties under the control of the same person. 40 CFR §262.20(f).

While designed to benefit small quantity generators, such as universities seeking to consolidate their hazardous waste activities, DoD will also benefit. Military generators may transport hazardous wastes from one area of an installation to another by using the public highway that bisects the installation.

### Emergency Response Activities

EPA has also clarified long-standing EPA policies regarding the applicability of RCRA requirements to emergency response activities. These munitions-specific provisions are applicable both to military and non-military emergency response activities and are therefore scattered throughout the regulation, i.e., 40 CFR §§262.10(i), 263.10(e), 264.1(g)(8)(i)(D)(iv), 265(c)(11)(i)(D)(iv), and 270.1(c)(3)(i)(D)(iii). In essence, these provisions codify exemptions from the generator, transporter, and permitting requirements in connection with immediate responses to emergencies involving munitions or explosives.

For example, emergency response personnel need not obtain a generator identification number, make a hazardous waste determination, complete a RCRA manifest, mark or label the item, or obtain a regular RCRA treatment permit. A RCRA emergency permit is required, however, in those cases where the emergency response specialist determines that time will allow.

EPA also made clear in the rule's preamble that emergency response personnel need not be concerned with land disposal restrictions and corrective action requirements. They must maintain records of the actions taken for three years. These exemptions are directed toward relieving emergency response personnel from being distracted by RCRA's complicated administrative and substantive requirements.

#### Permit Modifications

The new definition of when munitions become a waste will encompass munitions that DoD previously did not view as wastes. EPA has partially assuaged DoD's concern that existing permitted facilities would be unable to accept these newly designated wastes if their permit or permit application does not specifically allow the receipt of wastes from off-site sources. The rule allows a "grace period" during which DoD facilities may seek modifications of their permit or permit application to allow receipt of these off-site wastes.

A permit holder may continue to accept waste military munitions despite the absence of such language or inclusion of an explicit restriction on receipt from off-site sources if the facility was already permitted to handle waste military munitions on the effective date of this rule, August 12, 1997; if the permit holder submits, by August 12, 1997, a Class 1 modification request to remove the restriction; and if the permit holder submits a Class 2 modification request by February 7, 1998.

To qualify for the "grace period," the modification is limited to removal of the off-site restriction. Other modifications to increase quantities or to accept new waste streams are outside the "grace period" provision. Because most of DoD's existing treatment permits are still pending regulatory approval, most modification requests will be to amend the permit application, rather than an actual permit. In these interim status cases, facilities must amend their Part A and B application prior to accepting off-site wastes, i.e., these changes are not subject to the August 1997 and February 1998 deadlines.

While this provision seems to be straightforward, the Services remain concerned because the final decision to grant or deny the modification request still rests with the regulator. DoD is also pursuing a technical amendment to make clear that the "grace period" also applies to similar modifications to storage permits.

#### Striking A Balance

The Military Munitions Rule is the result of a concerted effort by EPA and DoD to strike a balance between environmental concerns and explosives safety concerns. The Rule, as finally promulgated, clarifies how and to what extent RCRA's waste management scheme will apply to waste munitions activities. It provides federal and state regulators and the public with the oversight and input to which they have become accustomed in other waste management activities. It also affords DoD an opportunity to manage its munitions, both product and waste, in a way that is sensitive to environmental concerns while accomplishing its national defense mission. The task now is to work with state and federal regulators to ensure that the rule is implemented consistently in all the jurisdictions in which DoD has a presence.

**Harmon Decision Deals Enforcement Blow  
to Regulated Community - CPT Anders**

The U.S. EPA's Environmental Appeals Board (EAB) recently-issued decision in In Re Harmon Electronics, Inc., RCRA (3008) Appeal No. 94-4 (EAB, Mar 24, 1997), 7 E.A.D. \_\_\_, weakened industry's position on three key issues when contesting enforcement actions under the Resource Conservation and Recovery Act (RCRA).

For a 14 year period, employees of a Missouri company, Harmon Electronics, illegally disposed of various unused organic solvents by dumping them out the back door of the facility. Harmon management discovered the practice during an internal compliance assessment in November 1987 and ordered it stopped immediately. After assessing the environmental damage caused by the dumping, Harmon self-disclosed the disposal practice to the Missouri Department of Natural Resources (MDNR) seven months later. Since EPA had delegated hazardous waste permitting and enforcement authority to Missouri, MDNR inspected the site and entered into negotiations with Harmon. MDNR concluded that, "because of Harmon's voluntary disclosure and its cooperation in completing work to characterize the site," Harmon would be allowed to enter into a consent decree, rather than face an administrative order with a possible punitive fine. *Id.* at 6. The consent decree contained standard language that it "settled the petition," and that it "shall apply to all persons, firms, corporations or other entities who are or will be acting in concert and *in privity with*, or on behalf of, the parties to this Decree. . . ." EPA Region VII, which retains oversight authority in state RCRA programs, informed MDNR that Harmon's violations constituted "class I" violations under EPA's RCRA Enforcement Response Policy. EPA threatened to overfile MDNR if the latter did not pursue monetary penalties. When MDNR did not, Region VII filed a four-count complaint against Harmon, proposing a penalty of \$2,343,706.

At the administrative hearing in January 1994, the Presiding Officer lowered the penalty to \$586,716. Harmon's appeal to the EAB raised, among others, three important issues: (1) whether the Region's overfiled enforcement action was barred by RCRA and res judicata principles; (2) whether the Region's action was barred by the statute of limitations, since the violations took place more than five years before the enforcement action; and (3) whether the gravity-based portion of the penalty should have been eliminated under EPA's audit policy, since the violations were self-reported and voluntarily corrected.

**EPA Overfiling State Action**

In support of its position on the overfiling issue, Harmon first noted EPA's disregard of the plain language of RCRA § 3006, which provides that authorized State programs operate "in lieu of" the federal program, and that any action by the State under its authorized program "shall have the same force and effect" as actions taken by EPA. Harmon also pointed out that, while overfiling is appropriate when the State has taken *no* enforcement action, the appropriate response when EPA believes the enforcement response is inadequate is to withdraw the state authorization. *Id.* at 11. The EAB dismissed these arguments, citing the "well-established reading of the statute" that authorizes EPA to take action even after a State has already done so. *Id.* at 12.

Harmon's second point in support of its overfiling position was that the Region's enforcement action was barred by res judicata principles. Because the Harmon/MDNR consent decree was signed by a circuit court judge, Harmon argued, the full faith and credit statute, 28 U.S.C. § 1738, required that federal courts give the same preclusive effect to a state court judgment that other state courts would. *Id.* at 13. EPA countered that it was not in privity with Missouri, and that res judicata principles only apply to claims that have been adjudicated, where the present consent decree "resolves no issues of fact or law." *Id.*

The EAB sided with EPA, ruling that the State authorization did not itself create privity between Missouri and EPA. The EAB explained that State authorization alone does not ensure an identity of interests for purposes of establishing privity, that privity requires a sufficient identity of interests between the parties -- in this case, between a State's enforcement interests and EPA's. The Board concluded, based upon evidence presented, including the fact that Region VII had pressed MDNR to pursue monetary penalties and the latter did not, MDNR and EPA did not in this case share a sufficient identity of interests. *Id.* at 17. The Board also cited *In re Martin Electronics, Inc.* 2 E.A.D. 381, 385-86 (CJO 1987), in support of the proposition that, even had the identity of Missouri's and EPA's interests been closer aligned in this case, the parties still were not in privity, since EPA's approval of the State's consent order was not required.

### Continuing Violations

In considering the second issue, the EAB conducted a lengthy examination of the precedents construing the 28 U.S.C. § 2462 statute of limitations, under which the government is barred from maintaining an action to enforce a civil fine or penalty unless the action is commenced within five years from "the date when the claim first accrued." The Board explained that a claim "accrues" when the legal and factual prerequisites for filing suit are in place, noting that this occurs at different points depending on the type of case (e.g., a victim's injuries suffered in an auto collision versus long-term health effects in a toxic tort case victim). *Id.* at 24. When the wrongful conduct is of the type that can continue over a period of time, "the violation accrues on the last day conduct constituting an element of the violation takes place." Thus, explained the EAB, the date when a violation accrues is different from the date it first occurs. A civil enforcement action can therefore be maintained "at any time beginning when the illegal course of conduct first occurs and ending five years after it is completed." *Id.* at 26-7. The Board also cited the plain language of RCRA § 3008, which allows penalties for "per day of noncompliance."

### Application of the EPA Audit Policy

With respect to the third issue, Harmon detected its violations in November 1987 and reported them in June 1988. Because of this good-faith effort, the Presiding Officer reduced the Region's originally proposed multi-day penalty by 66% and increased the downward adjustment for good faith. Although Harmon conceded that it had not met all nine conditions for elimination of the gravity-based portion of the fine set out in EPA's *Incentives for Self-Policing: Discovery Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706 (December 22, 1995) ("Audit Policy"), it maintained that it satisfied the "spirit" of the Audit Policy, and that the gravity-based penalties assessed should therefore be eliminated. The EAB rejected the "spirit" argument, citing Harmon's failure to recognize that an important aspect of the Audit Policy is to encourage settlement over litigation. *Id.* at 58.

Some point out that *Harmon* is a poor candidate for an Audit Policy test case, see, Toxics Law Reporter, Vol. 11 No. 13, p. 917 (January 22, 1997), since Harmon's self-disclosure was issued before the final Audit Policy was published, and because Harmon was deemed to be a repeat offender, having engaged in illegal dumping for over fourteen years. But, without specifically holding that a facility would be ineligible to eliminate the gravity based portion of a penalty unless all nine conditions of the Audit Policy were satisfied, the EAB left a clear impression that the Policy's conditions "are to be respected," making use of the Audit Policy's penalty reductions in instances of self-reported violations more difficult. See also, EPA's Audit Policy Interpretive Guidance, summarized in, Inside EPA, Vol. 18 No. 4, pp. 9-10 (January 24, 1997).

### Conclusion

The EAB's ruling in *Harmon* has significant ramifications. First, *Harmon's* resolute approval of EPA overfiling State consent orders -- even those approved by the State courts -- could thus force States toward more stringent enforcement responses than they otherwise might have pursued. States will be aware that an *Harmon*-energized EPA will be keeping a close watch on effective enforcement of the delegated hazardous waste program. This more authoritative supervisory relationship could hamper some installations' extensive efforts to nurture congenial relations with their State environmental regulatory agencies. *Harmon* also illuminates some of the differences underlying State and EPA enforcement priorities: while the EPA Region repeatedly cautioned and reproved MDNR for failing to punish the violator through punitive fines, MDNR sought to reward Harmon, through a no-fine consent order, for self-reporting its violations upon discovery and taking pre-disclosure steps to assess the extent of the contamination. Second, *Harmon's* interpretation of RCRA's contemplation of when a violation "accrues," and the notion of a "continuing violation" is damaging, as the ruling allows enforcement agencies to stretch a single "act" of noncompliance into a continuous violation. Taken to its logical conclusion, one act of illegal dumping, as in the Harmon case, can be thus penalized as the multi-year operation of an unpermitted hazardous waste disposal facility and can bring an enforcement action any time within five years after the spill is ultimately cleaned or a proper permit is obtained. Finally, EAB's ruling that compliance with the "spirit" of the Audit Policy would not necessarily be enough to earn elimination of the gravity portion of an assessed fine further reduces the likelihood that self-reporting a violation would be in a facility's best interests, or that a good-faith report will regularly be rewarded with penalty reduction.

### ***Application of RCRA to a One-Time Spill - MAJ Lisa Anderson-Lloyd***

An occasional occurrence during operational training is the accidental release of material such as oil or other fluids. This may be due to a minor leak from a vehicle or a larger spill as the result of a major accident. These materials are usually deposited on other than RCRA managed treatment, storage, or disposal facilities, and often on private property.

RCRA establishes a "cradle to grave" regulatory scheme for the treatment, storage, and disposal of solid and hazardous waste. Congress' intent throughout the legislative history of RCRA has been the protection of human health and the environment from the disposal of discarded hazardous waste. Hazardous waste under RCRA is a subset of solid waste (42 USC 6903). For a waste to be classified as hazardous, first it must qualify as a RCRA solid waste. The starting point in determining the applicability of RCRA is an examination of the statutory and regulatory definitions of solid and hazardous waste.

The statutory definition of "solid waste" includes: "any garbage, refuse, sludge generated from a treatment plant, water supply treatment plant, or air pollution control facility and other discarded material" (42 USC 6903(27)). The only category of waste that might describe a spill is "discarded material." The statute does not further define "discarded material."

EPA's regulations define "solid waste" in the context of the management of hazardous waste under RCRA Subtitle C. The regulations implementing the statutory definition define solid waste as "any discarded material." Discarded material is further defined as abandoned, recycled, or inherently waste-like material (40 CFR 261.2). The regulations then specify that "materials are solid waste if they are abandoned by being: "(1) disposed of; or (2) burned or incinerated; or (3) accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated" (40 CFR 261.2(b)).

The subcategory of "hazardous waste" refers to those solid wastes that may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed" (42 USC 6903(5)). EPA's regulatory definition of hazardous waste specifies that a solid waste is a hazardous waste if it is not excluded from the definition and is either specifically listed as hazardous or exhibits a hazardous waste characteristic (40 CFR 261.3(a)). EPA established three hazardous waste lists: (1) hazardous wastes from nonspecific sources, (2) hazardous wastes from specific sources, and (3) discarded commercial chemical products (40 CFR 261.31-261.33). If a solid waste is not a listed hazardous waste or a mixture of a listed waste and a solid waste, it may still be hazardous if it exhibits a hazardous characteristic. The four hazardous waste characteristics are ignitability, corrosivity, reactivity, and toxicity (40 CFR 261.20). The regulatory definition of hazardous waste identifies hazardous wastes for the purpose of Subtitle C regulation of these wastes. If a material satisfies the regulatory definition of solid waste and is hazardous under the regulations as either a listed or characteristic hazardous waste, then the comprehensive controls of Subtitle C apply. Subtitle C management includes permitting requirements, land disposal restrictions, and technical standards.

EPA does not consider it within the regulatory or statutory definitions of solid waste when the use of products for their intended purpose results in the deposit of hazardous material on the land. For example, the authorized use of pesticides is not covered by the regulatory scheme of RCRA. The regulations do not classify as solid waste those commercial products whose use involves application to the land when such products are used in their normal manner. Products applied to the land in their ordinary usage are not "discarded material" subject to waste management regulation.

In determining the applicability of RCRA to one-time spills during operational activity, the definitions of solid and hazardous waste must be considered. The key issue regarding the applicability of the regulatory definition to spills is whether the material has been "abandoned," as defined in the regulations. When material is spilled in the operation of equipment during normal training, the operator does not "abandon" the material. The focus of the activity is the use of the material, not the disposal of it. The fact that the material ends up in contact with the environment in the same way that wastes do is not dispositive. If the material is collected soon after the spill occurs, the recovered material would be considered solid waste when removed from the site for treatment or disposal.

Even if it can be successfully argued that the spilled material does not fall within the regulatory definition of "solid waste," it may fall within the broader statutory definition. The RCRA regulations clearly state that the regulatory definition of solid and hazardous waste applies only for purposes of implementing Subtitle C of RCRA (40 CFR 261.1(b)(1)). In issuing the final rule amending the definition of solid waste, EPA made it clear that the broader statutory definitions of solid and hazardous waste apply for purposes of enforcing the "imminent and substantial endangerment" provisions of 42 USC 7003 (50 Fed Reg. 614, 627, Jan 4, 1985; 40 CFR 261.1(b)(2)). The imminent and substantial endangerment provision of RCRA provides broad remedial authority to address a hazard to health or the environment presented by disposal of solid or hazardous waste. Courts have supported EPA's position that the regulatory definition of solid waste is narrower than the statutory definition. See, e.g., Connecticut Coastal Fisherman's Association v. Remington Arms Co., 989 F. 2d 1305 (2d Cir. 1993).

EPA's position is that if products are released into the environment and left indefinitely, they eventually become discarded within the statutory definition of "solid waste." In Remington Arms, the Second Circuit Court of Appeals agreed with the EPA in finding that lead shot and clay targets left in Long Island Sound had accumulated long

enough to be considered solid waste. The court did not decide how long materials must accumulate before they are considered discarded. Both EPA and the courts, however, have concluded that the statutory definition applies only to suits brought to abate an imminent or substantial endangerment to human health or the environment.

Therefore, if a spill is left in place, the spilled materials may be considered "discarded" within the statutory definition of "solid waste," and possibly within the regulatory definition. A failure to respond to a spill of hazardous material could be evidence of an intent to discard. It is unclear at what point in time a spill that has not been cleaned up would be considered a statutorily "discarded" solid waste subject to section 7003 remedial action or a regulatory solid waste subject to Subtitle C regulation. In accordance with Congress' intent, EPA applies the broader definition of solid waste for remedial purposes in contrast to regulatory purposes in order to preserve the widest latitude to address imminent threats to human health and the environment. RCRA's regulatory management requirements are limited to activities that warrant cradle to grave regulation. It is reasonable to construe the definition of solid waste narrowly for regulatory purposes to avoid the imposition of Subtitle C requirements.

The specific provisions of the RCRA corrective action program do not apply to one-time spills. Key corrective action provisions found at RCRA section 3004(u) and (v) require EPA to incorporate corrective action obligations into any permit issued. RCRA section 3008(h) subjects interim status facilities to corrective action authority. These provisions require clean up of any past or present contamination that results from operation of a "solid waste management unit."

EPA proposed a regulatory framework for implementing corrective action in July 1990 and issued a revised advanced notice of proposed rulemaking in May 1996. In the 1990 proposal, EPA defined the term solid waste management unit or SWMU to mean, "Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include an area at a facility at which solid wastes have been routinely and systematically released." An example of this, provided by EPA, is a loading area where operations result in a small but steady spillage that contaminates the soil over time. In this proposal, EPA also recognized that not all areas where releases have occurred are considered SWMUs. The proposal specifically indicated that a one-time spill that had been "adequately" cleaned up would not constitute a SWMU. EPA warned, however, that if the spill is not cleaned up it would be "illegal disposal" and subject to enforcement action.

In the 1990 proposal, EPA recognized that military firing ranges and impact areas are not SWMUs. Unexploded ordnance fired during target practice is not discarded material since the ordinary use of ordnance includes placement on the land. EPA cited a U.S. District Court decision (Barcello v. Brown, 478 F. Supp. 646, 668-669 (D. Puerto Rico 1979)), which suggests that materials resulting from uniquely military activities fall outside the definition of solid waste and are not subject to RCRA corrective action. More recently in the Military Munitions Rule, EPA affirmed the proposition that the normal use of munitions in training activities, including the resulting deposit on the land, does not constitute disposal within the meaning of RCRA (62 FR 6621).

EPA recognizes two definitions for both solid and hazardous waste, one definition from the RCRA statute for the purpose of remedial enforcement and one definition found in the regulations for the purpose of the Subtitle C management program. Although one-time spills may not be solid waste under the narrower regulatory definition, they may become RCRA statutory wastes if they are left in place and pose an "imminent and substantial endangerment" under RCRA Section 7003. One-time spills are not subject to the more specific corrective action provisions, which require clean up of contamination from SWMUs.

In managing our spills, we must adequately and in a timely manner clean up the material and reduce the likelihood of a release that may with the passage of time be considered "discarded" or pose an "imminent and substantial endangerment."

***Endangered Species Litigation - CPT David Stanton***

In a unanimous ruling on 19 March 97, the Supreme Court held that the Endangered Species Act (ESA) citizens suit provision (16 U.S.C. Section 1540(g)) negates the traditional "zone of interests" test traditionally used to determine standing to bring suits. The Court also held that, for purposes of the Administrative Procedures Act (APA), plaintiffs who suffer economic harm as a result of jeopardy determinations by the U.S. Fish and Wildlife Service (Service) under the ESA are included within the zone of interests of affected persons for purposes of standing to bring suit under the APA.

In Bennett v. Spear, 1997 WL 119566 (U.S.), ranchers and irrigation districts located within the Bureau of Land Management's Klamath Irrigation Project challenged a Service Biological Opinion (BO) regarding the effects of Project water levels on two endangered fish species. The Service found that the long-term operation of the Project was likely to jeopardize the fish, and then identified reasonable and prudent alternatives that included maintaining minimum water levels in two reservoirs. The petitioners argued that the Service's jeopardy determination violated Section 7 of the ESA, and that the BO also had the effect of designating critical habitat without the requisite consideration of economic impacts, in violation of Section 4 of the ESA. (The suit was brought against the Service, and did not include the Bureau of Land Management). The United States District Court for the District of Oregon dismissed the complaint on the grounds that the plaintiffs did not have standing, since their "recreational, aesthetic, and commercial interests . . . do not fall within the zone of interests sought to be protected by ESA." The United States Court of Appeals for the Ninth Circuit affirmed, holding that the "zone of interests" test limits classes that may bring an ESA challenge under either the APA or the ESA citizens suit provision.

In overturning the Ninth Circuit, the Supreme Court (quoting the ESA citizens suit provision stating that "any person may commence a civil suit"), held that the zone of interests test does not apply to suits brought under the ESA citizens suit provision. Further, the Court held, because the petitioners' allegation of economic harm is sufficient to satisfy the requirement that they claim to have been "injured in fact" by the Service's BO (which was found to constitute a final agency action) and because their injury was "fairly traceable" to the BO, the petitioners have standing under Article III. The Court went on to hold that petitioners' claim that the Service failed to perform a nondiscretionary function by not considering economic impacts while effectively creating critical habitat, falls under the ESA citizens suit provision at 16 U.S.C. Section 1540(g)(1)(C). With respect to petitioners' claims that the Service violated Section 7 of the ESA, the Court found that the ESA citizens suit provision only includes violations committed by regulated parties. Therefore, since the Service is not a regulated party under this section, the petitioners' Section 7 claims, by default, fall under the APA. Applying the zone of interests test to the Section 7 claims, the Court found that the petitioners' claimed economic harm was sufficient to place them with the zone of interests protected by the ESA.

This decision opens the door to a new class of ESA challenges, i.e., those based on economic harm. Furthermore, because many such challenges may now be brought under the APA, the ESA's 60-day notice requirements will no longer apply, and successful plaintiffs may be able to recover attorneys fees under the Equal Access to Justice Act.

***Integrated Natural Resources Management Plan  
(INRMP) Guidance Released - MAJ Thomas Ayres - - -***

On 21 March 1997, Headquarters, Department of the Army issued the "Army Goals and Implementing Guidance for Natural Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP)" (hereinafter Guidance). In accordance with the Guidance, each installation in the United States with 500 or more acres, and certain OCONUS installations, must complete a PLS and complete and execute an INRMP. The Defense Planning Guidance also established goals to have all PLSs completed by Fiscal Year (FY) 1998 and to have an approved INRMP for each applicable installation by FY 2000.

The purpose of completing a PLS and an INRMP is to ensure that natural resources conservation measures and Army activities on mission land are integrated and are consistent with Federal stewardship and legal requirements. The primary objective of the INRMP, as recognized in the Guidance, is support of the installation operational mission. In the memorandum distributing the Guidance, the Army's Assistant Chief of Staff for Installation Management reinforces the critical relation of an INRMP to mission-support: "The availability of training land in the future will be largely determined by what is done today to properly integrate land use and natural resources management."

**Approval of INRMPs**

Army Major Commands (MACOMs) review and approve INRMPs. Prior to MACOM approval, the fish and wildlife aspects of the INRMP should be concurred in by the state fish and wildlife agency and the U.S. Fish and Wildlife Service.<sup>1</sup> Additionally, all aspects of the INRMP that potentially may impact any federally-listed threatened or endangered species must be the subject of consultation under Section 7 of the Endangered Species Act.<sup>2</sup> Finally, prior to implementing the INRMP, the installation must fully comply with the National Environmental Policy Act (NEPA) of 1969.

**NEPA Compliance**

As stated in the Guidance, all installation INRMPs must undergo NEPA analysis in accordance with Army Reg. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) [hereinafter AR 200-2]. In most cases, because INRMPs are derived to maintain and sustain natural resources, production of an environmental assessment (EA) accompanied by a Finding of No Significant Impact (FONSI) should satisfy the requirements of AR 200-2 and NEPA. If, however, implementation of the INRMP will significantly impact the environment, then the installation must produce an Environmental Impact Statement (EIS).

When complying with AR 200-2, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. When preparing an EA

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<sup>1</sup> Pursuant to the Sikes Act, 16 U.S.C. §§ 670a -670o, the military has authority to enter into cooperative agreements with the Secretary of Interior (U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service) and State fish and game agencies. Additionally, in accordance with 10 U.S.C. § 2671, the Army must require that all hunting, fishing, and trapping at an installation be held in accordance with State fish and game laws.

<sup>2</sup> The Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2), and also see implementing regulations at 50 C.F.R. Part 402 - INTERAGENCY COOPERATION - ENDANGERED SPECIES ACT OF 1973, AS AMENDED.

and a FONSI under AR 200-2, the installation has the latitude to use the scoping process to elicit public comments early in the drafting process or may limit the public comment to that period dictated by AR 200-2. A longer public comment period may be beneficial if the installation determines that certain aspects of the INRMP may be controversial. Past experience shows that potentially controversial aspects of an INRMP include those portions of an INRMP that determine management of:

- (a) guidelines for hunting and fishing programs (access, fees, etc.);
- (b) treatment of threatened and endangered species; and,
- (c) consumptive uses of natural resources, to include commercial forestry, grazing and agricultural leases, and mining.

The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a reasonable range of alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP - perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency.

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***Editor's Note: Beginning in May 1997, the Environmental Law Bulletin will be available on the Environmental Law Division Home Page (<http://160.147.194.12/eld/eldlink2.htm>) for download as a text file or in Adobe Acrobat format. Currently, the Bulletin is available in the environmental law files area of the LAAWS BBS.***

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***Overseas Environmental Baseline Guidance  
Document (OEBGD) - MAJ Thomas Ayres***

The Air Force is currently updating the OEBGD, but no formal draft has yet been submitted to the Services for comment. Department of Defense Instruction (DoDI) 4715.5, "Management of Environmental Compliance at Overseas Installations," dated 22 April 1996, mandates the establishment and maintenance of the OEBGD. The OEBGD is designed to set specific media criteria that establish a baseline standard for military installations and that are designed to protect human health and the environment.

The Air Force is designated as the lead Service to review and update the OEBGD, last promulgated in October 1992, under DoDI 4715.5. As part of the review process, Air Force technical staff recently submitted a draft, revised OEBGD to several technical counterparts at overseas commands. This informal draft created some controversy at several overseas commands. As a result, Air Force environmental staff requested guidance from the Office of the Deputy Under Secretary of Defense (Environmental Security) (DUSD(ES)) on several "policy issues" raised by the revision process. At a meeting called by the DUSD(ES) staff on 16 April 1997, the Services agreed to coordinate several policy precepts to guide the Air Force revision process. DoDI 4715.5 also requires formal coordination with the Services prior to publication of an OEBGD, and the Services requested a sufficient formal comment period to allow time for coordination with overseas commands on any draft revised OEBGD.

***Executive Order for Protection of Children from Environmental  
Health Risks and Safety Risks - MAJ Allison Polchek***

On 21 April 1997, President Clinton issued Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks, 62 Fed. Reg. 19885. This Executive Order notes that children often suffer disproportionately from environmental health and safety risks, due in part to a child's size and maturing bodily systems.

In light of these risks, the Executive Order requires Federal agencies, to the extent permitted by law and mission, to identify and assess environmental health and safety risks that may affect children disproportionately. The Order further requires Federal agencies to ensure that its policies, programs, activities, and standards address these disproportionate risks.

The Order defines environmental health and safety risks as "risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breath, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to)."

Installations will find that this Executive Order could have wide reaching implications, and are urged to begin integrating this Executive Order into daily practice. One area of obvious integration is within the National Environmental Policy Act (NEPA). As is currently being done with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, NEPA is the perfect tool to examine the effects an action will have on children.

***No Ands, Ifs, Or Buts: Federal Facilities  
And The Clean Water Act - CPT Silas DeRoma***

Bigger, better, faster? This seems to be the trend of federal facility sovereign immunity waivers under the major federal environmental laws. On 20 March 1997, Representative Dan Schaefer (R., Colo.) introduced H.R. 1194 - A Bill to Amend the Federal Water Pollution Control Act (FWPCA) Relating to Federal Facilities Pollution Control. The bill, also known as the Federal Facilities Clean Water Compliance Act of 1997, expands the present waiver of sovereign immunity under the Clean Water Act (CWA), and, for the most part, follows the pattern set by the waivers passed under the Resource Conservation and Recovery Act and the Safe Drinking Water Act, both of which Mr. Schaefer introduced. The legislation was initially referred to the House Committee on Transportation and Infrastructure. It was subsequently referred to the Subcommittee on Water Resources and Environment on 3 April 1997. This bill exemplifies the type of "rifle shot", low resistance, CWA legislation expected during this Congress. While it may appear that the legislation has a way to go before becoming law, unlike other proposed environmental reforms, such as the amendment of Superfund or the Intermodal Surface Transportation Efficiency Act, this bill is not one that is likely to encounter significant legislative opposition. As this legislation moves through Congress, more information will be provided.

***Cumulative Effects under the National Environmental  
Policy Act (NEPA) - MAJ Allison Polchek***

The Cumulative Effects analysis of most National Environmental Policy Act (NEPA) documents is an area worthy of careful scrutiny, yet it is often found to be legally deficient. This deficiency is not surprising considering the lack of direction on this issue provided in NEPA and in the implementing Council on Environmental Quality (CEQ) regulations. To remedy this problem, CEQ recently published "Analyzing Cumulative Effects Under the National Environmental Policy Act." The CEQ guidance is intended to provide a practical framework for assessing the cumulative impacts of an agency's proposed action.

Many actions, taken in isolation, are insignificant. When added together with other actions, however, the effects may collectively become significant. These are the types of effects NEPA documents should be examining. Cumulative effects are defined in 40 C.F.R. ' 1508.7 as:

The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

The new CEQ guidance recommends paying particular attention to cumulative effects during the scoping process, while describing the affected environment, and when

analyzing the environmental consequences of the action. The guidance provides eight general principles that can be used to assess cumulative effects. The CEQ recommends examining the cumulative effects on a resource or ecosystem beyond traditional political or administrative boundaries. This might require examining the impact an action will have on an entire watershed, not just within the installation. In addition, CEQ provides many examples of tools available to assist the NEPA practitioner in assessing cumulative impacts, ranging from simple checklists and questionnaires to more formal modeling or trends analysis techniques.

Army NEPA practitioners are encouraged to adopt some or all of the CEQ guidance in order to strengthen this traditionally weak area of analysis. Copies of the guidance are available on the Environmental Law portion of the LAAWS BBS.

### ***Enforcement Update - CPT Anders***

Statistics. Since Congress expanded the waiver of sovereign immunity for solid and hazardous waste violations in October 1992, Army installations have been assessed \$13.4 million in 147 fines and penalties cases. The 83 RCRA fines account for 78 percent of the fines, totaling \$10.4 million. Although 97 of the 147 fines and penalties were levied by States for a total of \$4.7 million, the 29 imposed by the EPA amount to \$8.5 million. EPA recently released statistics on agency enforcement actions taken in fiscal year 1996. See *Toxics Law Reporter*, March 5, 1997, at 1098-9. See also, *Environmental Policy Alert*, March 12, 1997, at 38. EPA's combined total of \$173 million in criminal, civil, and administrative penalties assessed (\$76.6 in criminal penalties, \$66.3 in civil judicial penalties, and \$29.9 million in administrative penalties) was the highest in EPA history. In one notable case, Georgia-Pacific Corporation paid more than \$35 million in penalties and projects to settle allegations of illegal and unpermitted emissions of volatile organic compounds from several wood processing facilities. Sylvia Lowrance, EPA's Deputy Assistant Administrator for Enforcement and Compliance Assurance, indicated that the numbers will likely increase markedly in FY 1997, stating, "the environmental cop is back on the beat."

Reporting Requirements. Note that the new Army Regulation 200-1, published in February 1997, provides slightly different reporting requirements than the previous 1990 edition of the regulation. Installations must report enforcement actions through the Army Compliance Tracking System Report (ACTS) within 48 hours and any fine or penalty within 24 hours. AR 200-1, paras. 1-27a(16), 13-6, 15-7b (1997). An enforcement action is defined as "[a]ny written notice of a violation of any environmental law from a regulatory official having a legal enforcement authority." This includes a "Warning Letter, Notice of Noncompliance (NON), Notice of Violation (NOV), Notice of Significant Noncompliance (NOSN), Compliance Order (CO), Administrative Order (AO), Compliance Notice Order (CNO), [and] Finding of Violation." *Id.* at Appendix A. Any enforcement action that "involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact" will be reported within 48 hours through legal channels (i.e., through the MACOM ELS), at the same time it is reported through ACTS; this initial notification will be followed by written notification within seven days. *Id.*, para. 15-7c. Note that the notification requirement extends not only to an assessed fine, but also to a "fee," because states have in the past assessed a "fee" against installations that was actually imposed to settle a minor instance of noncompliance, or was actually a veiled tax, which Federal facilities may not pay. The portion of the reporting requirement quoted above, therefore, requires not that a report be made of every fee that is paid, but of every "enforcement action that involves a fee."

Increased use of BEN Model by States. EPA's Inspector General is recommending that EPA prompt state regulatory agencies to recover the economic benefit of noncompliance from alleged violators. The EPA inspector general's March 31, 1997 report, *Further Improvements Needed in the Administration of RCRA Civil Penalties*, notes specifically:

[I]t is essential that EPA and state enforcement actions recover a violator's benefit of economic noncompliance [through use of the "BEN Model"], and that EPA's "overfiling" authority can be used to recover these benefits "when necessary," i.e., when a state has not properly applied the BEN Model.

*Inside EPA*, Vol. 18, No. 15, April 11, 1997. The current DoD position is that application of economic benefit principles based upon avoided or delayed compliance expenditures to Federal facilities is not appropriate for the following three reasons: 1) DoD is not a profit seeking enterprise and has a non-profit mission; 2) DoD facilities do not self-determine their environmental compliance budgets, but are dependent upon outside executive and legislative authorizations; and, 3) the federal budget structure is such that imposing BEN-based penalties is more likely to reduce the level of environmental compliance spending than increase it and could draw money from otherwise achievable environmentally beneficial projects. In light of this stepped-up pressure from EPA, installations should be wary of state attempts to impose inappropriate BEN-based penalties in enforcement actions.

#### **Has EPA Deserted Oregon Natural Desert? - CPT DeRoma**

"Yes, no, maybe" seem to be the answers out of EPA on the issue of regulating nonpoint source runoff from federal lands via state water quality certification programs. This issue arose after the United States District Court for the District of Oregon issued the opinion in *Oregon Natural Desert Association v. United States Forest Service*, 940 F. Supp. 1534 (D.Or. 1996). In that opinion, the District Court held, *inter alia*, that the phrase "any discharge" under § 401 of the Clean Water Act was not restricted to point source discharges. Under this interpretation, the District Court held "§ 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources." *Id.* at 1540. Following the court's decision, EPA began drafting a preliminary framework for the regulation of nonpoint sources similar to those addressed in the case. The framework purportedly would have broadened the types of discharges from federal lands to be considered by states when establishing water quality standards and also would have delineated how states should analyze the impact of the discharges upon water quality.

Several Federal agencies were surprised by both the decision in *Oregon Natural Desert* and the EPA's subsequent reaction. Since these events, the Department of Agriculture has asked the Department of Justice (DOJ) to support an appeal of the case, and DOJ has filed a motion of appeal in the case, pleadings for which are due on 21 May 1997. When asked about the status of the framework, one EPA staff member stated that progress had been frozen. The individual would not state if further progress would occur or whether the project had been abandoned. If work on the framework resumes, it is possible that it could affect significantly the ability of states to control Federally permitted, or licensed, activities on Federal lands via § 401 certification. These activities are currently addressed by memoranda of understanding between EPA and Federal agencies. As noted above, DOJ pleadings on this issue are due 21 May 1997. As this case progresses, further updates will be provided.

***Punitive Fines and the Clean Air Act - LTC Mel Olmscheid***

Recently, in *United States v. Tennessee Pollution Control Board*, No. 3:96-0276 (M.D. Tenn. Apr. 10, 1997), the United States District Court for the Middle District of Tennessee held that the Clean Air Act (CAA) allows States to assess punitive fines against federal facilities. This decision is contrary to another United States District Court decision in *United States v. Georgia Dep't of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995).

The case began when, on 20 August 1993, the Tennessee Air Pollution Control Board (TAPCB) assessed a \$2,500 civil penalty under the Tennessee Air Quality Act against the Milan Army Ammunition Plant (Milan) for past violations of Tennessee's Division of Air Pollution Control Rules. Although Milan did not dispute the underlying allegation that it failed to provide written notice of its intention to remove 330 linear feet of pipe containing asbestos, the Army contended that the sovereign immunity of the United States barred imposition of the penalty. Following a hearing on this issue, an administrative law judge concluded on 26 January 1996 that CAA § 118(a) waives sovereign immunity.

On 14 February 1996, the TAPCB issued orders providing final denial of the Army's administrative appeal and staying enforcement of the penalty until exhaustion of judicial remedies. The action in the U.S. District Court for the Middle District of Tennessee to enjoin the penalty followed.

In the memorandum in support of the motion for summary judgment, the United States argued that, based on the Supreme Court decision in *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992) (*DOE v. Ohio*), the CAA did not waive sovereign immunity for civil penalties. In *DOE v. Ohio* the Supreme Court held that neither the Clean Water Act (CWA) nor the Resource Conservation and Recovery Act (RCRA) waived sovereign immunity for civil penalties. The United States also emphasized the recent United States District Court ruling in *United States v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995), where that court, based on facts nearly identical to those in the Milan case, held that the CAA does not waive immunity.

TAPCB filed a cross-motion and argued that the CAA's language was sufficiently different from the CWA and RCRA to find a waiver. TAPCB argued as well that the citizen suits provision, CAA §304, also provided a waiver. On 8 April 1997, the court rejected the United States' arguments, granted TAPCB's cross motion for summary judgment, and dismissed the complaint for failure to state a claim.

This adverse decision was not entirely unexpected because the same judge hearing the *Milan* case had held in *United States v. Tennessee Air Pollution Control Board*, 31 Env't Rep. Cas. 1500 (M.D. Tenn. 1990), that the CAA allowed States to impose punitive fines against federal facilities. The Army expects this decision will be appealed to the United States Court of Appeals for the Sixth Circuit and has not changed its position that Army facilities do not pay punitive fines assessed under the CAA.

***U.S. Army Environmental Management and ISO 14000 - Mr. Steve Nixon***

The Future of Environmental Management? The Army Study Team working on ISO 14000 recently briefed their progress to the Deputy Assistant Secretary of the Army for Environment, Safety and Occupational Health. ISO 14000 is an internationally accepted standard for environmental management. Many multinational companies are converting to

this management system so that they can compete in the European market, where such a system is a generally accepted practice. The Army is examining any potential benefits from adopting or incorporating such a system into our current environmental management program. The Army's Environmental Compliance Assessment System and Installation Status Report II programs are widely approved by regulators and provide commanders with all required information to stay in compliance with environmental laws. Although ISO 14000 is not required to ensure compliance, it might add an improved management tool for use by installation commanders. The Study Team recommended, and the DASA approved, a pilot program at Fort Lewis and Tobyhanna Army Depot to gauge the benefits of ISO 14000 to the Army.

***EAB Decision Upholds Use of Penalty Policies -  
Even Absent Rulemaking - CPT Anders***

A February decision by the U.S. Environmental Protection Agency's Environmental Appeals Board (EAB) dealt a small blow to industry when it ruled that EPA's penalty policies under the various environmental statutes could guide the process of setting the amount of a punitive fine, even though the policies failed to use the formal public notice and comment rulemaking process under the Administrative Procedure Act (APA). *In re Employers Insurance Company of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, (EAB, Feb. 11, 1997), 6 E.A.B. \_\_ (Wausau II). This rulemaking argument has long been used by industry facilities as a possible defense in contesting an assessed administrative penalty derived mechanically under one of the environmental penalty policies.

In 1995, Chief Administrative Law Judge Jon Lotis had ruled that EPA's environmental penalty policies do not bind judicial penalty decisions, unless those policies were promulgated through a formal rulemaking process under the APA. *In re Employers Insurance Company of Wausau and Group Eight Technology, Inc.*, TSCA-V-C-66-90, 1995 TSCA LEXIS 15 (1995) ("Wausau I"). In *Wausau I*, Judge Lotis lowered a fine assessed against a company under the Toxic Substances Control Act (TSCA) from \$76,000 to \$58,000, holding that the fine was rigidly derived under EPA's TSCA Penalty Policy, which had not been adopted pursuant to the APA's rulemaking procedures. *Wausau I* was hailed as a significant victory for industry, as it obligated EPA, through evidence presented at hearing, to support factually any findings, assumptions, or determinations on which its assessed penalty rests. Then, as long as the hearing judge had "considered" the penalty policy, he or she would be free to apply the policy or to depart from it, basing the decision solely upon the strength of the parties' evidence. *Wausau I*, 1995 TSCA LEXIS at 36-37.

On appeal, however, the EAB ruled that Judge Lotis had taken an extreme position on the rulemaking issue and held that mechanically applied penalty policies could form the basis for civil penalties, even though they had foregone APA formal rulemaking procedures. The EAB explained, "we readily agree that EPA's adjudicative officers must refrain from treating [a penalty policy] as a rule," and should question the policy where applicable, *Wausau II*, TSCA Appeal No. 95-6 at p. 35, citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988). But the Board stopped short of disallowing reliance on the penalty policies by enforcement officials, "either as a tool for developing penalty proposals or to support the appropriateness of such proposals in individual cases." *Id.*

The EAB's *Wausau II* ruling still retains some of the sting of Judge Lotis' *Wausau I* ruling, to the satisfaction of industry practitioners. The EAB specified that penalties are only supportable to the extent that they are:

calculated in a manner consistent with the Agency's obligation to "take into account" the factors enumerated in [TSCA penalty policy]. . . . It is therefore incumbent upon the complainant in all TSCA penalty cases, in order to establish the 'appropriateness' of a recommended penalty, to demonstrate how the TSCA penalty criteria relate to the particular facts of the violations alleged.

*Id.* at p. 29. The EAB also definitely reaffirmed that presiding officers are not bound by EPA's penalty policies and can depart where the facts make departure appropriate. The Board, citing 40 C.F.R. § 22.27(b), held: if "the Presiding Officer does not agree with the Region's analysis of the statutory penalty factors or their application to the particular violations at issue, the Presiding Officer may specify the reasons for the disagreement and assess a penalty different from that recommended by the Region. While the Presiding Officer must consider the Region's penalty proposal . . . , he or she is in no way constrained by the Region's penalty proposal, even if that proposal is shown to have 'take[n] into account' each of the prescribed statutory factors." *Id.* at p. 30.

Installation attorneys should press EPA regional counsel to comply fully with Agency internal policy guidance directing its attorneys to build a case for administrative fines sought in enforcement actions. See, *Memorandum to EPA Regional Offices on Use of Penalty Policies in Administrative Cases*, written by Robert Van Heuvelen, Director of EPA's Office of Regulatory Enforcement (December 15, 1995). The memorandum directs its attorneys to follow specific procedures. For example, "[i]n the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence." The memorandum also directs EPA attorneys to maintain a "case 'record' file," which documents all factual information relied upon in developing the penalty amount pled in the complaint, and which "may be provided to the Respondent with copies of relevant documents from the case file."

### ***Discovery of Electronic Information A Gold Mine or a Mine Field? - Ms. Carrie Greco***

A recent study has shown that in the year 2000, 60 billion e-mails will have been sent.<sup>1</sup> Along with this increase in the use of the e-mail system, is an increase in the number of people who approach the e-mail in a casual manner. Many people see e-mail as a temporary and private means of communicating an informal message. This is a misconception, however, because not only does the e-mail message exclude the non-verbal cues that notify the reader of the context of the message, but the message is not necessarily private, or temporary. This fact becomes visible after someone inadvertently transmits an embarrassing message to the wrong person, but it also becomes dangerously apparent when this message becomes discoverable pursuant to a discovery request for electronic information.

Litigators have found electronic data a gold mine of information ever since the rules on discovery have been expanded to include electronic information in 1970. Fed. R. Civ. P. 34. More recently the court found that e-mail messages were "records" under the Federal Records Act. *Armstrong v. Exec. Office of the President*, 1 F.3d. 1274 (D.C. Cir. 1993). As litigators increase their use of interrogatories and depositions to obtain electronic

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<sup>1</sup> Scott Dean, E-Mail Forces Companies to Grapple with Privacy Issues, CORP. LEGAL TIMES, Sept. 1993, at 11.

information, the question is no longer whether, but when you will be asked to respond to a request for electronic information. When you obtain this request you have an obligation and a duty to understand both the terminology and the technology of your client. Quickly, the use of discovery turns what was a gold mine into a mine field. To avoid getting lost in the mine field of information, here are some points to consider as you prepare for a request.

1. Discovery has limitations. Although a litigator can request any information that can be obtained or translated through detection devices into a reasonable usable form, the traditional limitations of discovery still apply to a request for electronic information. For example, in *Fennel v. First Step Designs, Ltd.*, 83 F.3d. 526 (1st. Cir. 1996) the court found that discovery of a hard drive was an undue burden on the owner.
2. Privileges may not apply. Remember that the protection of attorney client privilege only applies to communications between the attorney and the client, and not to communications between two co-workers. Also keep in mind that the work product doctrine only applies to work in anticipation of litigation, and not to documents or electronic messages created in the normal course of business
3. Anticipate discovery requests before creating the information. Educate others on the proper time and place for electronic information. Create electronic documents with the expectation that they may be subject to the scrutiny of a judge or jury at some later date in the context of an adversarial proceeding.
4. Enforce Record Retention Regulations. Manage electronic information in accordance with your document retention regulations. This will help determine when information that is not subject to litigation can be destroyed. Absent a reasonable business purpose, destruction of information to frustrate a subsequent suit can provide a basis for sanctions, adverse evidentiary presumptions, and even tort liability for spoliation.
5. Know the form of your records. Become familiar with the various forms of information that are on your installation's computer systems. This may include word processing files, spreadsheets, databases, bulletin boards and service providers.
6. Know where your records are. Electronic information may be found in various forms. This includes floppy disks, hard drives, even those that are potentially broken, PCs connected to a LAN, portable PCs used by employees while away from the office, backups and archival tapes, and data stored on magnetic tapes. Keep in mind that tangible things might be requested along with the intangible. Identify new forms of technology that could become a target of a discovery request and initiate information management rules from the outset.
7. Create a system that will organize your e-mail. Discuss with key personnel at the installation what types of information must be retained and the proper methods on how to organize key information in a manner that is retrievable. Keep in mind that your purpose of information organization is going to be different than the other people in your organization. Therefore, when you present your need to organize the information generated at the installation, recognize that this might bring on conflict and try to implement a system that efficiently and effectively minimizes a particular risk while creating the least amount of disruption.
8. Remember evidentiary rules. If you find yourself doing a search for electronic information pursuant to a discovery request, keep in mind that evidentiary issues require the

documentation of how the file was found, what tools were used to locate it, where it was found, and how it was transferred to its current format. Avoid creating any basis for a charge of altering or tampering with data, of introducing a virus into the computer being searched, or of inadvertently crashing the system and losing valuable data.

Through preparation, you can avoid being faced with a land mine in your electronic information search and be prepared when new technology arrives at your installation.

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***Editor's Note: Look for the Environmental Law Bulletin on the Environmental Law Division Home Page (<http://160.147.194.12/eld/eldlink2.htm>) for download as a text file or in Adobe Acrobat format by the end of this month. Currently, the Bulletin is available in the environmental law files area of the LAAWS BBS.***

# LEAD-BASED PAINT UPDATE

Colleen A. Rathbun  
U.S. Army Environmental Center  
Office of Counsel

# THE PAST

- EPA Region IX and the State of California requested investigation at the Presidio San Francisco of lead-based paint which had chipped off outside of buildings due to weathering
- Army responded with memorandum from AEC Office of Counsel (February 1996)

# THE INTERIM

- EPA Region IX elevated the question to HQ EPA
- HQ EPA issued legal opinion stating that CERCLA provides authority to respond to releases of lead-based paint (December 1996)
- EPA Region IX followed with more detailed legal opinion (January 1997)

# THE INTERIM (CONT)

- Attorneys for services met with DOD OGC
- Informal discussions between HQ EPA and DOD

# THE PRESENT

- DOD OGC has stated that it will support the Army's legal position
- The Army will comply with Title X, where applicable
- The Army will handle lead-based paint on a site-by-site basis

# THE PRESENT (CONT)

- Lead-based paint which chips or flakes off of a building through natural weathering is not a release of a hazardous substance to which the Army must respond under CERCLA

# THE PRESENT (CONT)

- If lead-based paint poses a threat to human health and the environment, and/or regulators raise such a concern, the Army will discuss the issue, and attempt to resolve on a site-by-site basis, using the Army's authority over its real property and its authority over safety issues

# THE PRESENT (CONT)

- EPA's comments on FOSTs and FOSLs are to be handled in accordance with DOD guidance - unresolved comments are to be attached to the document

# THE PRESENT (CONT)

- Navy Interim Guidance
- Comply with Title X and TSCA requirements
- Comply with CERCLA when applicable; respond in same manner and extent as EPA has responded
- Attach unresolved FOST/FOSL comments to document and allow EPA to raise issue

AMSEL-LG

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Relationships with Non-Federal Entities

Ethical rules governing our relationships with Non-Federal Entities (NFE) are found in the Office of Government Ethics (OGE) *Standards of Ethical Conduct for Employees of the Executive Branch* and the Department of Defense (DOD) *Joint Ethics Regulation* (JER), DOD 5500.7-R. They are detailed, specific, and complex. This article, an extract from a writing by Mr. Michael Wentink of the Army Standards of Conduct Office, provides an overview of the rules. It is important to understand these rules since they are enforced through Federal criminal statutes and regulations.

The first step in dealing with and resolving any NFE question is to determine whether the relationship is personal or official. The nature of the relationship will guide the analysis and generate the answer, and more often than not, the results will be different depending on whether it is a personal or official situation.

**PERSONAL RELATIONSHIPS WITH NFEs**

Army employees are not barred from joining, participating in, or holding office in NFEs. On the contrary, they are encouraged to do so, especially when such activity will promote their professional or personal development, or make them an active part of the local military or civilian communities. However, there are rules that govern this personal participation.

**Conflicts of Interest:** By becoming an officer, director, or employee of a NFE, the Army employee has a relationship with that organization that restricts what he or she can do as an Army official. Specifically, a criminal law implemented in Subpart D of the *Standards of Ethical Conduct* prohibits such employees from participating in official matters pertaining to the same NFE, even though someone else might make the final decision affecting the financial interests of that organization. It does not matter that the Army employee is not paid by the organization, because the law imputes the financial interests of the organization to the officer, director, or employee of the organization.

Even if the Army official is not an officer, director, or employee of a NFE, but rather is an “active participant,” he or she has a “covered relationship” with the NFE. The *Standards of Ethical Conduct* require the official to consider the appearances created by this relationship, and normally the Army employee should not participate in those official matters where the NFE is a party or represents a party to the official matter. Examples of “active participants” include members of the NFE’s rules committee or the NFE’s points of contact for a membership drive. “Active participants” would not include members of a NFE who merely pay their dues, read the monthly newsletter, and attend an occasional function.

This means that an Army official who is an officer, director, or employee of a NFE may not participate as an Army official in such matters as whether to send an employee to a training program sponsored by the NFE, or to provide a speaker or other support to a symposium hosted by the NFE. If the Army official is not an officer, director, or employee of a NFE, but is an “active participant” in the organization, the prohibition is not quite so absolute. Nevertheless, to avoid the appearance of impropriety, the Army employee should refrain from participation in such official Army matters.

**Other Ethical Issues.** Military personnel and civilian employees may not:

- Accept positions as officers, directors, or similar positions in a NFE offered because of their official duty position (*e.g.*, a chief of staff may not accept a position in a local NFE that traditionally offers this position to the incumbent of this duty position).
- Use their office, title, or position in connection with their personal participation with NFEs (*e.g.*, may not show their title or duty position on NFE’s letterhead listing its officers; may not task their subordinates to assist them in their personal participation such as drafting correspondence and running errands).
- Personally solicit subordinates or prohibited sources (generally, DOD contractors), or permit the use of their names in a solicitation that targets subordinates or prohibited sources in NFE membership drives or fundraising campaigns.
- As a matter of personnel policy, the Deputy Secretary of Defense directed on 23 July 1996 that General Officers may not accept compensation for being an officer or a member of the board of a NFE. A couple of very limited exceptions are permitted but only with the approval of the Secretary of the Army.

**Can Do’s.** After all the negatives, we often are asked: “Well, what can we do?”

- DA personnel are free to join NFEs and, if it will not interfere with their official duties because of a conflict of interest, actively participate or even accept an office.
- Military members may use their rank and component designation in connection with their private association activities (*e.g.*, General, U.S. Army; Staff Sergeant, U.S. Army).
- If the “agency designee” (a supervisor or, for a General Officer in command, his Ethics Counselor) determines, after consulting with his or her Ethics Counselor, that it is in the Army’s interest, Army personnel may accept free attendance at a “widely attended gathering” (meaning a large and diverse group) sponsored by a NFE, on their own time or during an excused absence. (If the value of the free attendance exceeds \$250, the Army employee must report this gift on his or her Financial Disclosure Report.) For example, after consulting with his or her Ethics Counselor, a supervisor might conclude that it is in the Army’s interest for a subordinate to attend a free technical symposium, including a cocktail party and dinner, attended by industry and government representatives and sponsored by a professional or technical association.

## **OFFICIAL RELATIONSHIPS WITH NFEs**

**Participation in Events.** Army organizations may provide speakers or logistical support (*e.g.*, space, security, public address systems, *etc.* ) for a NFE event if certain criteria in the JER are met. For example, it is generally inappropriate to support a NFE event if the charge for admission exceeds the event's reasonable costs. The Army may even cosponsor an event (such as a technical symposium) with a NFE if certain criteria and conditions are met, to include a written agreement. Often, however, cosponsorship is inappropriate when it is the Army that is really sponsoring the event with some assistance from a NFE. In this case, the assistance should be provided pursuant to contract, and it must be clear that the Army, not the NFE, is sponsoring the event.

The manner and degree of Army participation in any event determines what kind of event it is, *i.e.*, Army sponsored, cosponsored, or Army supported. Additionally, if the Army cosponsors an event with a NFE or supports a NFE's event, it must be clear that the Army is not endorsing the organization.

The JER authority to participate in, support, or cosponsor events by and with NFEs is not a license for the Army to expend time and resources in support of a NFE above and beyond that permitted, or to help the NFE conduct its business. We must ensure that the expenditure of time and resources is of direct benefit and interest to the Army, and commensurate with that benefit and interest. The conclusion that a NFE is "friendly" to the Army and supports its goals and objectives is not sufficient justification to direct employees, using official Army time, to do such things as: assist the NFE with a membership or fundraising campaign; assist the NFE with a NFE seminar beyond providing speakers and other limited support; help the NFE fix its computer system; assist the NFE with auditing its books.

**Endorsement.** The *Standards of Ethical Conduct* prohibit government employees from using their title, office, or position to officially endorse a NFE or its activities beyond that permitted in JER para. 3-210 (*e.g.*, fundraising for the Combined Federal Campaign and Army Emergency Relief). However, certain activities which encourage professional, community, and other involvement are permissible so long as they do not violate the rules that prohibit official bias, endorsement, favoritism, or unlawful support.

Specifically, commanders and supervisors may encourage Army personnel to take an active part in their military and civilian communities, to include joining, supporting, and participating in service and benevolent organizations. They may publicize and describe organizations that seem to share and support national defense, Army and community goals and ideals, and/or that help promote excellence in military or other skills. Finally, they may publicize events sponsored by such organizations.

The following are some specific "do's and don'ts" for official relationships.

### **Some Specific Don'ts:**

- Don't designate a point of contact in a directorate or unit for a NFE's membership drive.
- Don't address subordinates in formation or on Army letterhead to extol the virtues of a particular NFE.

- Don't require subordinates to attend a NFE meeting so that they can learn about and join a NFE.
- Don't engage in coercive tactics such as requiring a subordinate to explain a decision not to participate in or join a NFE.

**Some Specific Do's:**

- Commanders and supervisors may encourage subordinates to join and become active in professional, technical, community, or other types of organizations. Within this context, it would be permissible and not a prohibited endorsement of any one organization to identify and describe various organizations that support professional development or the military community, or that are part of the civilian community and worthy of consideration. It would even be permissible to briefly inform Army personnel concerning the goals, objectives, and activities of some of the organizations. It would also be acceptable to inform Army personnel, in a neutral manner, of an ongoing membership drive.
- Commanders and supervisors may require subordinates to attend a professional development training session sponsored by a NFE. For example, commanders may require soldiers to attend a seminar concerning financial responsibility hosted by AAFMAA. However, the NFE may not try to gain members or to market any of its products during the seminar.

**CONCLUSION**

The laws and regulations regarding official and personal relationships with private organizations are complex. This article is not all inclusive. Officials acting in their official or personal capacities in matters involving private organizations should actively seek legal advice from their Ethics Counselors to ensure they are acting properly. Finally, if they are acting as "agency designees" to approve a course of conduct, the JER requires that they consult with their Ethics Counselor.

KATHRYN T. H. SZYMANSKI  
Chief Counsel

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DO-95-026  
MEMORANDUM

June 26, 1995

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts, Director

SUBJECT: Sanjour v. Environmental Protection Agency

On May 30, 1995, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, issued its decision in *Sanjour v. Environmental Protection Agency* (No. 92-5123). The decision sustains a First Amendment challenge to a portion of 5 C.F.R. 2635.807, the section within the Standards of Ethical Conduct entitled "Teaching, speaking, and writing."

For your convenience, the court's decision is available on The Ethics Bulletin Board System.

The case was brought by two Environmental Protection Agency employees who sought to accept travel reimbursements for making speeches in their private capacities concerning the subject matter of their Government work. The Standards of Conduct provide that, subject to an exception for teaching certain courses, "an employee . . . shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties." 2635.807(a). "Compensation" is defined to include travel reimbursements. 2635.807(a)(2)(iii). Teaching, speaking and writing "related to duties" is defined to include teaching, speaking, and writing where "the subject of the activity deals in significant part with: (1) [a]ny matter to which the employee is assigned or to which the employee had been assigned during the previous one-year period; [or] (2) [a]ny ongoing or announced policy, program or operation of the agency." 2635.807(a)(2)(i)(E)(1)-(2). Accordingly, under the Standards, the employees were prohibited from accepting the offered travel expense reimbursements.<sup>1</sup>

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<sup>1</sup> The prohibition was also set forth in 5 C.F.R. 2636.202(b), an earlier synopsis of the policy later refined in 2635.807, as well as in an advisory letter issued by the Environmental Protection Agency to its employees.

The employees challenged the regulation on First Amendment grounds. The district court dismissed the challenge, 786 F. Supp. 1033 (D.D.C. 1992), and a panel of the Court of Appeals for the D.C. Circuit affirmed. 997 F.2d 1584 (D.C. Cir. 1993). The court of appeals, however, subsequently vacated the panel decision and set the case for rehearing en banc. 997 F.2d 1584 (D.C. Cir. 1993). On rehearing, the court, as indicated, sustained the employees' First Amendment challenge and held invalid the prohibition on receipt of travel reimbursements for speech "related to duties" under 2635.807(a)(2)(i)(E)(1)-(2). The court did not address the other definitions of the term "related to duties" under 2635.807(a)(2)(i) and it explicitly reserved judgment on the constitutionality of the rule as applied to "senior executive employees."

We believe that Sanjour was wrongly decided and that it adversely impacts the ability of the Federal ethics program to ensure conduct by Federal employees consistent with high ethical principles, especially the principle that employees shall not use public office for private gain. The authority to decide whether to seek further review in the Supreme Court, however, resides with the Justice Department. The Department has until August 28 to file a petition for writ of certiorari and this time period may be extended by the Supreme Court.

We have been advised by the Department of Justice that the relief granted by the court--invalidation of 2635.807 insofar as it prohibits reimbursement for travel expenses for unofficial speech about Government work by non-"senior" employees--applies only to the named plaintiffs in Sanjour because the court did not certify a class including as plaintiffs persons in addition to those who brought the case. For the present, and pending further developments in the case that would foreclose the possibility of further review of the court's decision, we have decided, as a matter of policy, not to extend this relief to other Government employees. If the Solicitor General decides not to seek Supreme Court review or if the Supreme Court declines to review the decision, we will reevaluate this policy.

For the time being, and until further notice, we ask that you advise employees that 2635.807 remains in effect as to them in all of its applications, including the prohibition on receipt of compensation, including travel expense reimbursement, for teaching, speaking, and writing activities that deal in a significant way with current or recent assignments or with current programs, policies, or operations of their agencies.<sup>2</sup>

We will advise you of further developments in the case as they occur.

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<sup>2</sup> Part-time or intermittent "special Government employees," as before, are subject to less restrictive standards. See 2635.807(a)(2)(i)(E)(4). Other parts of 2635.807, not addressed by the court in Sanjour, naturally also remain in effect. Thus, employees continue to be prohibited from accepting compensation, including travel expense reimbursement, for teaching, speaking, and writing activities that are "related to duties" as that term is defined in 2635.807(a)(2)(i)(A)-(D). High-level noncareer employees are subject to additional restrictions under 2635.807(a)(2)(i)(E)(3). The Court of Appeals for the District of Columbia Circuit, sitting en banc, issued its decision in *Sanjour v. Environmental*

**AMSEL-LG (27-1a)**

**MEMORANDUM FOR SEE DISTRIBUTION**

**SUBJECT: Requests to DA Personnel for Interviews, Notices of Depositions, Subpoenas, and Other Requests or Orders Related to Judicial or Quasi-Judicial Proceedings**

**1. In accordance with Army Regulation (AR) 27-40, Litigation, present or former Department of the Army (DA) employees shall not disclose official information in response to subpoenas, court orders, notices of deposition, or other requests unless they obtain the written approval of the appropriate Staff Judge Advocate (SJA) or legal adviser.**

**2. All DA employees should be aware of Section 7-2, Policy, of AR 27-40, which outlines the procedure to be followed if an employee receives a request for an appearance or for release of official information related to a judicial or quasi-judicial proceeding. That section provides, in pertinent part, as follows:**

**Referral to deciding official. If present or former DA personnel receive a subpoena, court order, request for attendance at a judicial or quasi-judicial proceeding, or request for an interview related to actual or potential litigation, and it appears the subpoena, order or request seeks disclosures described in (a) above [official information], the individual immediately should advise the appropriate SJA or legal adviser.**

**3. Therefore, any such requests received by personnel within this Command must be immediately forwarded to the SJA or cognizant legal adviser in the CECOM Legal Office. The SJA or cognizant legal adviser (in coordination with DA Litigation Division, if applicable) is empowered as the "deciding official" to make the determination to either grant written approval to disclose the official information requested or challenge the disclosure of the requested information. An employee should avoid direct contact with the originator of such requests and should rely on the CECOM Legal Office to handle the issue. If written approval is granted by the SJA or cognizant legal adviser, an employee must be careful to disclose, release, comment upon, or testify only to those matters specifically addressed in the approval.**

**4. The involvement of present or former DA personnel in private litigation (defined as litigation in which the United States has no interest) is a personal matter between the witness and the requesting party, unless one or**

**more of the following conditions apply:**

- (a) The testimony involves official information.**
- (b) The witness is to testify as an expert.**
- (c) The absence of the witness from duty will interfere seriously with the accomplishment of a military mission.**

**AMSEL-LG**

**SUBJECT: Requests to DA Personnel for Interviews, Notices of Depositions, Subpoenas, and Other Requests or Orders Related to Judicial or Quasi-Judicial Proceedings**

**If one or more of these conditions apply, the SJA should be consulted for further advice and direction.**

**5. The POC for this matter is Kim Melton at Ext. 21146.**

**///Signed///**

**KATHRYN T. H. SZYMANSKI**  
**Chief Counsel**

**DISTRIBUTION:**

**M, O, & R**

## Letter to the Editor

Dear Mr. Klatsky:

I feel compelled to write concerning the article "Cash for Frequent Flyers?" in Volume 97-2 of the Newsletter. The article summarized a memorandum from Mr. Matt Reres, the Army Deputy General Counsel (Ethics & Fiscal) "addressing the availability of Army appropriations to pay cash awards to employees who enroll in commercial "Frequent Flyer" programs." Mr. Reres concludes that such awards would not be an allowable expenditure of appropriated funds, because "enrolling in [such programs] does not entail the quality and degree of personal effort for which Congress intended to authorize monetary recognition under the [Government Employees' Incentive Awards Act]." Although that opinion is technical correct, I think it discourages an innovative solution to what has been a long standing problem.

First, I would point out that the TACOM proposal was to provide awards to employees who enrolled in frequent flyer programs AND obtained free tickets which were used for that employee's official travel. It is not merely the act of enrolling. Consider what is required of the employee to obtain this free ticket. Not only a lot of travel, which is generally not much fun, and not just the bureaucratic hassles of maintaining a different frequent flyer account for each airline and making sure your travel is accurately recorded each time you fly. The real burden is that the employee must either keep detailed records of which miles are personal and which are official, or forego any chance of obtaining a ticket for personal use on that airline. The airlines will not allow a person to have two accounts, one personal and one official, and we all know that commingling personal and official miles in one account means that the miles will all be considered official unless you can document otherwise. Add to this the real challenge in actually using the free tickets which are offered under these programs, with their many blackout dates, advance notice requirements, etc., and I believe that the degree of "personal effort" expended by an employee in saving the government money is significant, if not downright heroic.

Further, the GAO supports creative agency efforts to reward their employees for saving the government's travel dollars. In a recent opinion to the General Counsel of the Railroad Retirement Board (B-27640, May 19, 1997) GAO endorsed a plan to allow an employee who had two frequent flyer accounts to exchange personal miles in one for official miles in the other (this employee obviously had kept good records of which were which), thus allowing two tickets to be issued: one for the employee's personal use, and one for official use. In the course of the opinion, GAO noted the GSA's efforts to encourage the use of frequent travel programs by federal employees in order to conserve travel dollars, including the issuance of GSA Bulletin FTR 17, October 24, 1995, which "encouraged agencies to use their authority under the Government Employee's Incentives Awards Act . . . to develop incentive awards programs under which cash awards may be paid to employees who accrue travel savings to the agency through participation in frequent traveler programs."

Bottom line: payment of an incentive award to an employee who jumps through all the various hoops to use frequent flyer mileage to reduce government travel costs, is legal. What is more important, it's an incredibly good idea. Perhaps the view expressed in this Letter to the Editor should be forwarded to DA for their consideration.